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SOME COMPARATIVE ASPECTS OF THE LAW OF LANDLORD AND TENANT

SOME two years ago Mr. B. Plummer published an article in this *Review* on 'some aspects of the law of landlord and tenant'.[1] This article enumerated seven rules of the law of landlord and tenant —all of them familiar to lawyers—which in the opinion of the author are unsatisfactory and should be amended at the earliest possible opportunity. The Haldane Society in its recent booklet 'Law Reform Now'[2] has endorsed Mr. Plummer's recommendation and stated that it regards the reform of the law of landlord and tenant as of particular urgency and capable of being carried through within the next three years. The Haldane Society has also pointed out that it expects that the demand for a reform of this part of the law would be endorsed by wide circles of the public independent of their political views and allegiance.

The purpose of the present article is to support the view adopted by the Haldane Society and by Mr. Plummer through arguments taken from comparative law. The thesis which I hope to prove is that the Continental laws, or at least the most important ones among them, have for decades and mostly even for centuries provided those solutions which Mr. Plummer and the Haldane Society have advocated. I am, of course, aware of the fact that what has been approved by most, if not by all, Continental legal systems, need not necessarily be either just or practicable in this country. But at least it cannot be said that what is suggested by the reformers now, is an untried innovation. And it may perhaps not be without significance that the rules whose adoption is now being urged have already been in force over the larger part of Europe for some considerable time and have not been found to be either unjust or inconvenient.

My article is designed to be read as a commentary on the seven suggestions set forth by Mr. Plummer. I find no quarrel with any of his statements on English law. In order to avoid unnecessary repetition of what he has said I must refer my readers to his article for a fuller treatment of English law and for well-chosen examples from English cases.

The Continental legislation and literature and the number of judicial decisions on questions relating to the law of landlord and

[1] *Modern Law Review*, Vol. 9 (1946), pp. 42 ff.
[2] Victor Gollancz, 1947. Mr. Gerald Gardiner, K.C., and Mr. W. W. S. Pollard have edited the Committee's Report.

tenant is so vast that no individual could hope to read and digest more than a fraction of it. I have to apologise to my readers if my comments—like other comments in legal history—are somewhat longer than the text to which they are appended. Even so I have done no more than to select—I hope not too injudiciously—from a material that is much larger than the following remarks may induce my readers to believe. I have not intended to provide a full treatise on the comparative law of landlord and tenant.[3] My intention was much humbler : to illustrate and to support with the help of comparative law the contemporary demands for legal reform. ' Si plus minusve secuero, se fraude esto.'

I

Mr. Plummer says[4] :

' There is no implied warranty or covenant by the landlord with the tenant on the creation of a tenancy that the landlord had a good right in all respects to create the tenancy for the term and according to the tenor thereof.'

I think I am not guilty of any exaggeration if I assure my readers that there is no Continental legal system where the warranty which Mr. Plummer advocates has not been implied ever since the reception of Roman law, *i.e.*, for at least the last four centuries. The Roman rule was that the tenant (conductor) did not acquire possession, but was considered a mere detentor. It was, however—as Professor Buckland[5] has stated—' the duty of the locator (landlord) to maintain this detention, so that he was responsible if the conductor lost it either from a defect in title, or because the locator had conferred some *ius in rem* on a third person who would not be bound by the contract '. From Roman law the rule that the landlord is responsible in damages for any defect in title has been taken over into all modern Continental laws. Thus Grotius explains that a man may let property to which he is ' totally a stranger ', but if he ' cannot procure to the hirer the use of it, he is liable for all costs, damages and loss of profit '.[6] This has remained the rule of Roman-Dutch law up to the present.[7] In France the Code Civil states expressly that it is the duty of the landlord to procure for the tenant the peaceful use of the property during the period of the tenancy.[8] Protection against what is generally referred to by French jurists as ' troubles de droit ' is an elementary duty of the landlord. French lawyers distinguish from the ' troubles de droit ' the so-called ' troubles de faits ',

[3] Those who require this may be referred to the article by Zimmerle, ' Miete ', in the *Rechtsvergleichende Handwörterbuch*, Vol. 5 (1936), pp. 318 ff.
[4] *L.c.*, p. 42.
[5] Buckland, *A Textbook of Roman Law*, 2nd ed. (1932), p. 500.
[6] *Inleiding tot de Hollandsche Rechts-geleerthed*, 3, 19, 5. The translation quoted in the text is that of Professor Lee.
[7] Maasdorp, *Institutes of South African Law*, Vol. 2 (4th ed., 1939), pp. 236 ff.
[8] Code Civil, Art. 1719 (3) and 1725.

i.e., interferences by third parties who do not claim to be entitled to interfere with the tenant's peaceful possession, as, *e.g.*, interference by thieves or unruly neighbours. For such disturbances the landlord is not responsible.

Similarly the German and Swiss Codes [9] provide that the landlord is responsible for defects of title, except, of course, if the defects were known to the tenant. The Scandinavian laws in general differ from the Continental laws in that the influence of Roman law has been very much less intensive and nowhere less intensive than in the law relating to landlord and tenant. But there is no disagreement on the point that the landlord warrants title to let and is responsible in damages if he does not possess the title which he has warranted by implication.[10] The Spanish Civil Code is in complete agreement with the French.[11] The Brazilian Code provides that it is 'the duty of the landlord to protect the tenant against any interference and disturbance by third parties having or alleging to have any legal rights in respect of the property'.[12] In fact I have failed to succeed in finding any Continental or other civilian legal system in which the rule that the landlord warrants title to let has not always been recognised.

Mr. Plummer continues [13] that 'there is no implied warranty or covenant by the landlord with the tenant . . . for quiet enjoyment against all the world, but only as regards the landlord and persons legally claiming under or in trust for him'. This is, of course, merely another aspect of the rule which has just been stated. The Continental Codes deal by implication with this aspect in the rules referred to. It would appear safe to say that this warranty is implied too in every civilian legal system.

II

'Apart from the Housing Act, 1936, and apart from any special arrangements, there is no implied warranty by the landlord that property (not being a furnished house or flat) demised or let to a tenant is fit for habitation or use. He is under no obligation to give a proposed tenant information regarding the state of repair of such premises, nor to disclose defects rendering the property

[9] German BGB, s. 541, Swiss Code of Obligations, Art. 258. Austrian law has adopted the same principle, although the Code is silent on the point, see Ehrenzweig, *System des österreichischen allgemeinen Privatrechts*, 2nd ed. (1928), p. 443 and note 37.

[10] Sweden: *Law on the Use of Landed Property*, Chap. 1, Sects. 4–6 (translated into German in Carlson, 'Schwedisches Sachenrecht', in *Die Zivilgesetze der Gegenwart*, Vol. 10, Pt. 1, Sect. 3b (1936), p. 211). Finland: *Law on the Letting of Houses of May 12, 1925*, Sect. 18 (translated into German in Wrede, *Finnisches Sachenrecht, in Die Zivilgesetze der Gegenwart*, Vol. 10, Pt. 1, Sect. 3a (1933), pp. 132 ff.

[11] Art. 1554, 1556.

[12] Art. 1191.

[13] *L.c.*, p. 42.

dangerous, even though he is aware of their existence or created them himself.' [14]

The warranty demanded here by Mr. Plummer has for a very long time been implied by all Continental legal systems. In fact these systems have for centuries gone even further in protecting the tenant than Mr. Plummer and the Haldane Society would appear to demand. It is a well-known fact that the Roman law relating to landlord and tenant was not distinguished by particular regard for the interest or well-being of the insularii who inhabited the ill-famed flat houses of the city of Rome. Yet Roman law gave them more than the protection which our contemporary reformers demand for modern tenants. This may have been partly due to the fact that Roman law treated the tenancy of immovable property in the same manner and by the same rules by which it dealt with movable property. But whatever the reason, the result is unequivocal. If the property was not fit for the use for which it was intended according to the agreement, the tenant could claim to be discharged. The landlord was responsible in damages if he had fraudulently failed to disclose the defect or had expressly or impliedly assured the tenant that no such defect existed.[15]

Through the Roman-Dutch law this rule was received into the modern South African law. 'The hirer', said Grotius, 'may demand injury due to defect in the property hired if the defect was known to the other party or ought to have been known to him in the way of his business, otherwise not'.[16] In the latter case, however, the tenant was not liable to pay the rent. Similarly modern South African law requires the landlord 'to see that the subject of the lease is free from such defects as will prevent its being properly and beneficially used for the purpose for which it was leased'.[17] The substance of this rule is also received in Scottish law. In agricultural—as distinguished from residential leases—this is interpreted to mean a warranty that the buildings, walls and fences will with reasonable care last for the entire period of the lease.[18]

In French law the landlord, if nothing to the contrary is provided in the agreement between the parties, has to guarantee the absence of hidden defects which prevent the use of the property for the purposes for which it was intended.[19] A frequently

[14] *L.c.*, p. 44.
[15] Windscheid-Kipp, *Lehrbuch des Pandektenrechts*, Vol. 2, 8th ed. (1900), s. 400, note 9 with further references.
[16] Grotius, 3.9.12.
[17] Lee, *Introduction to Roman-Dutch Law*, 4th ed. (1946), p. 302. Maasdorp, *Institutes of South African Law*, 4th ed. (1939), p. 238. Damages are only payable if the landlord knew or should have known of the defects.
[18] See Gloag-Henderson, *Introduction to the Law of Scotland*, 4th ed. (1946), p. 358 with further references.
[19] Art. 1721 Code Civil.

quoted example [20] is that of a flat which is unfit for use because it is infested by bugs or whose chimneys discard their fumes into the interior of the accommodation.

In this connection it deserves to be noted that French law—like other modern legal systems—in this field as in others—has abandoned the rigid principle of Roman law according to which there is no responsibility for damages except in those cases in which the act or omission from which the responsibility arises has been committed intentionally or negligently. In Roman law, as has been seen, the landlord was responsible in damages only if he knew or ought to have known of the defect, though the tenant's duty to pay rent, lapsed in both cases. In French law it no longer matters whether the landlord knew or ought to have known of the defect. He is responsible in damages to the tenant even if he did not know of it and need not have known of it. This novel principle seems to have been adopted originally by a misreading of the Roman sources. But notwithstanding occasional criticism [21] —it has found reception not only in France, but also in most other Continental legal systems.

On the other hand, according to French law the landlord does not guarantee the absence of defects which the tenant knew of when he entered the tenancy agreement or of which he was unaware at the time of the conclusion of the agreement solely because he was negligent in paying attention to the property. Thus—to repeat an example frequently quoted in French and Belgian textbooks [22]— if at the time of the inspection of the house by the tenant water was flowing down the walls of the rooms, the tenant cannot demand damages for this defect.

The more modern legal systems have, however, found it necessary to go one step further in protecting the tenant. The rules laid down by French law and those legal systems, which like the Belgian, follow the French model, did not distinguish in respect of the guarantee for defects between the letting of movable and the letting of immovable property. More recent codes have found it necessary to stress the obvious distinction between the two types of letting which clearly involve social considerations of vastly different character. The German Civil Code provides that the tenant of any accommodation intended for human beings is entitled to terminate the tenancy with immediate effect if the accommodation suffers from a defect which results in its use entailing considerable danger to health.[23] This right of the tenant

[20] See *e.g.*, Planiol-Ripert, *Traité Elémentaire de Droit Civil*. Vol. 2. 11th ed. (1937), p. 616, Colin-Capitant, *Cours Elémentaire Français*, 8th ed. (1935), p. 595; Josserand, *Cours de Droit Civil Positif Français*, Vol. 2, 3rd ed. (1939), p. 702. Belgian authors too give the same examples, see de Beus, *Overzicht van het Burgerlijk Recht*, 3rd ed. (1944), p. 395.

[21] See *e.g.*, Leonhard, *Besonderes Schuldrecht des BGB* (1931) p. 148.

[22] See the works referred to in the preceding note.

[23] Section 544.

to bring the tenancy to an end exists notwithstanding the fact that the tenant knew of the dangerous character of the accommodation at the time of the conclusion of the tenancy or that he expressly repudiated any rights arising out of this fact. It does not matter whether the health of the tenant or that of his family, his employees or third parties is affected. The Swedish law on the use of real property of 1907 incorporated a similar rule,[24] and so do the Swiss Code of Obligations of the same year[25] and the Finnish law on Tenancy Agreements in relation to Houses of 1925.[26] The Third Amendment of the Austrian Civil Code of 1916[27] provided still more drastically that the right of a tenant to refuse payment of rent on the ground that the property let is unsuitable for the contractual use cannot be restricted or abolished by agreement between the parties. In this connection the words 'contractual use' are not meant to imply that the parties must have expressly mentioned that the property is to be used for one or several specific purposes. It is sufficient if it can be shown from the circumstances of the case that the parties intended the property to be used for a defined purpose.[28]

To sum up: under the Continental laws the landlord is not bound 'to disclose defects rendering the property dangerous'. But it is in his own best interest to disclose such defects, because if he fails to do so he cannot enforce his claim for rent and under most laws he will also be liable in damages to the tenant. According to the more modern Codes even disclosure of defects is of no avail to the landlord if the defects render the property dangerous to human health. One might perhaps wonder whether the English courts could not arrive at the same conclusion by holding that an agreement by which one man lets and the other man hires accommodation which is dangerous to health, is contrary to public policy.[29] There can be little doubt that a rule of this type would beneficially influence the state of repairs of living accommodation.

I must add that I cannot find a parallel in the Continental laws

[24] Chap. 3, Sect. 15.
[25] Art. 254 (3).
[26] Section 7.
[27] Section 1096 (1).
[28] The French Code Civil says that the landlord must guarantee the absence of defects of the property 'qui en empêchent l'usage' and the interpreters merely require that it must have been 'l'usage pour lequel elle est destinée', see Colin-Capitant, *l.c.*, p. 595. The German Civil Code distinguishes between the defects which prevent ordinary use, those which prevent contractual use (in the sense explained in the text) and those defects whose absence has been expressly promised by the landlord, see ss. 535 ff. and the standard commentaries thereon.
[29] The Continental courts have, as far as I can see, never adopted the view that the doctrine of public policy can possibly be 'confined to the definite heads under which it is already applied', as Lord Halsbury maintained for English law in *Janson* v. *Driefontein Mines, Ltd.*, [1902] A.C. 49. See on this point recently Stone, *The Province and Function of Law* (1947), pp. 494 ff.

for the rule in *Dunster* v. *Hollis*,[30] the abolition of which is recommended by Mr. Plummer.[31] In this case it was held that where a building has been let to a number of tenants and the lessor retains control of the common staircase, the lessor is not under a liability to keep the staircase in repair. The very opposite is the rule in French, German, Swiss and Austrian law, because in these laws it is considered as an implied duty of the landlord to maintain proper ways of access to the accommodation which he has let.[32] The German Supreme Court has held that a local custom dispensing with the proper lighting of common staircases in flat houses was to be disregarded.[33]

III

Mr. Plummer furthermore charges English law with permitting a landlord in certain respects to derogate from his grant.[34] 'For example, if the tenancy is of a shop, and the landlord owns adjoining or neighbouring shops, he, unless he has expressly agreed with the tenant to the contrary, may let such shops to competitors of the tenant. And if, in fact, the landlord does agree with the tenant not to let his shops to a person carrying on the same trade, the agreement is not broken if some articles sold by the tenant are also sold by another tenant of the same landlord; and even if the articles form an important part of the tenant's trade, if the general trade of the competitor is a different one from that of the tenant, the landlord has not broken his covenant.'

The question dealt with here is, of course, in English law one that relates to the interpretation of the contract between the parties. The position is different in the Continental legal systems. The Continental Codes have standardised the terms of the contracts by implying certain clauses, so that the task of the courts—in the absence of special provisions in the individual contract forming the subject-matter of the dispute—was to decide upon a question of interpretation of the Code and not of contracts. Professor Gutteridge has given an admirable description of the wide powers enjoyed by the Continental courts in interpreting statutes and adapting them to the changing needs of the times.[35] The question referred to by Mr. Plummer forms, it is submitted, a significant example of the beneficial use to which such powers may be put.

The French Civil Code provides that the landlord has to enable the tenant to enjoy the peaceable use of the accommodation let to

[30] [1918] 2 K.B. 795.
[31] *L.c.*, p. 47.
[32] Colin-Capitant, *l.c.*, p. 593; Oegg, in *Kommentar zum BGB von Reichsgerichtsräten*, 9th ed., Vol. 2 (1939), p. 201, Ehrenzweig, *l.c.*, p. 439, note 23. On this point American law has deviated from English law, see Salner, *The Substantive Law of New York*, 12th ed. (1945), pp. 242 ff. with further references.
[33] *Official Reports in Civil Matters* (*RGZ*), Vol. 90, p. 65.
[34] *L.c.*, p. 47.
[35] Gutteridge, *Comparative Law* (1946) pp. 101 ff.

him. This rule has been interpreted by the French courts to mean that the landlord must not establish either a rival or a similar trade himself or for his own account in the vicinity.[35a] The courts are somewhat more lenient upon the landlord in regard to the question of letting accommodation to third parties who are competitors of the tenant. It has, however, been held that the landlord may be under an implied duty not to do so, even though the tenancy agreement does not contain a clause forbidding the letting to competitors, provided it appears from the general circumstances of the case that it was the common intention of the parties at the time of the conclusion of the contract that no such letting to competitors of the tenant should take place. The German courts have gone somewhat further in protecting the tenant.[36] They have held that, where the purpose of the agreement consists in enabling the tenant to carry on his business, a duty on the part of the landlord may be implied not to let to competitors. This duty may be violated not only by letting premises to competitors in the same building, but also by letting accommodation in another neighbouring building belonging to the same landlord. Anybody is considered as a competitor who offers the same or similar goods as a main activity of his trade. Mere competition in subsidiary activities is not sufficient.[37] Where a partnership is the lessor, the duty of not letting to competitors is imposed not only upon the partnership itself, but upon every individual partner.[38] The more recent decisions show a tendency to increase, rather than to relax, the liabilities imposed upon the landlord.

On the other hand Scottish law has adopted the same rule as English law : in the absence of a special clause in the agreement the landlord is under no obligation to abstain from using property, not let to the tenant, for the purpose of competing with the tenant. He is also under no obligation not to let such property to third parties competing with the tenant.[39]

The problem is, of course, one that is intimately connected with the contemporary structure of economic conditions. It would be futile to look for its solution in the old Roman law books and in the cases and law books of the early nineteenth century. They have no answer to it, because the problem had not yet arisen. Competition between business rivals did not exist then in the same manner and to the same degree to which it exists today. All that interested the older authorities was the question of physical or semi-physical interference with the tenant's enjoyment, such as

[35a] See Colin-Capitant, *l.c.*, p. 596 with further references.
[36] Oegg, *l.c.*, p. 192; *RGZ*, Vol. 119, p. 353 and Vol. 135, p. 242.
[37] *Juristische Wochenschrift*, 1938, p. 940, No. 4.
[38] RGZ 136, p. 266.
[39] *Craig* v. *Millar* (1885), 15 R. 1005. The date of this decision is significant. One may be permitted to question whether the law would have been the same, if the Scottish courts had had an opportunity to consider the question for the first time in, say, 1925.

disturbances by actual ejectment or by noises, obnoxious smells, etc. These authorities had no reason to consider the question of economic disturbances, because such disturbances had not yet occurred and neither were nor could be expected.

The legal systems which develop by way of following precedents obviously find it more difficult both to discover the existence of a novel problem and, once it has been discovered, to solve it than those legal systems which proceed by way of analysing fundamental ethical concepts and the systematic relations between them. The Codes had referred to 'disturbances'. It is a matter of interpretation what is and what is not a disturbance. The civilian systems have not hesitated to state that economic disturbances may to a certain extent be considered as legally equivalent to physical disturbances. There are, of course, differences as to the definition of what does constitute an economic disturbance. The principle as such, however, seems destined to gain increasing recognition.

IV

Mr. Plummer continues [40]:

> If a prospective landlord and a prospective tenant agree that the rates shall be paid by the tenant, as is usual in houses let by the quarter or longer, if the landlord manages to slip into the covenant or agreement to pay rates any one of the following words: 'duties' or 'outgoings', or 'impositions', or 'charges', the tenant may find himself saddled with the cost of permanent improvements such as street pavement charges, the cost of abating a nuisance, or of making drains in compliance with the requirements of the local authority, and it has been held that a tenant could not escape liability for bearing the cost of things . . . on the ground of the shortness of his tenancy.

This, too, is, of course, a question of the interpretation of agreements for which it is difficult to find exact parallels in any other legal system. It is a question of the interpretation of English terms and conceptions. It is a question of distributing public charges which elsewhere are distributed not by agreement between the parties, but by the administrative law from which the charges arise or which—like street pavement charges—are not known in other countries.

A number of Continental Codes, such as the German Civil Code and the Swiss Law of Obligations,[41] provide expressly that in the absence of any agreement to the contrary the liability to pay all charges on the property rests upon the landlord and not upon the tenant. While, of course, this clause contains nothing that is not also recognised in English law and perhaps nothing that would not follow from the nature of tenancy as a mere contractual relation between the parties, the fact that the Codes have expressly stated

[40] *L.c.*, p. 47.
[41] German BGB, s. 546, Swiss Code of Obligations, Art. 263.

it, has had some effect upon the courts in that it has taught the courts to consider in their interpretation the social and economic results and not to leave out of account the fact that tenancy is a merely temporal relationship, while ownership by its very nature is legally permanent. Thus the German Supreme Court in a number of remarkable judgments has held that clauses in tenancy agreements imposing upon the tenant of agricultural property or of industrial or business premises the duty to pay present and future charges upon the property must be interpreted to mean that the tenant is liable to pay only those charges which in accordance with the rules of reasonable economic distribution of burdens are payable from the profits to be drawn from the property and not those which are payable from the substance of the capital of its owner.[42] On the other hand the control of rents has in a number of countries led to imposing burdens upon the tenant, which the landlord can no longer be expected to bear in view of the fact that the rent which he can demand has not increased at the same rate at which the public charges have increased.[43]

For those cases in which the tenant is not only entitled to use the property, but as, *e.g.*, in the case of the tenancy of a farm, to draw its fruits, the Austrian Civil Code contains an interesting ruling. A distinction is drawn between those cases in which the rent has been fixed on the basis of an estimate of the net profits to be made by the tenant and those in which the rent is fixed as a lump sum. In the former case the tenant is responsible for all charges which have been deducted from the profits. In the latter case, however, the tenant is responsible for all charges, with the sole exception of interests on mortgages.

The question is perhaps one that cannot be satisfactorily solved either in advance by the law or post factum by the courts. Neither the one nor the other can prevent one party or the other—the tenant is not necessarily and not always the weaker party—from slipping some unfair clause into the agreement. Problems of this kind are probably best solved by collective bargaining between organisations of tenants and landlords. Such organisations exist in a number of Continental countries. They have worked out standard agreements, known to all lawyers and frequently also to the parties. The standard agreements provide a fair solution for the average case. They render it impossible for either side to ' slip in ' an unfair clause, because it will be an obvious matter of precaution for either party to compare the bargain which he is about to enter with the standard agreement. Any deviation from the standard agreement will have to be justified. In some cases the organisations have issued lists of ' undesirable clauses '. These lists

[42] *RGZ*, Vol. 115, p. 209 and Supreme Court in *Juristische Wochenschrift*, 1929, p. 1396, No. 30, see also Oegg, *l.c.*, p. 220.

[43] See *e.g.*, Austrian Mietengesetz of December 7, 1922, ss. 2 (*d*) and 4, quoted by Ehrenzweig, *l.c.*, p. 443.

incorporate the experiences of the past. In this country the standard works on precedents could perform a similar service, if they were not exclusively used by lawyers. The standard contract of the organisations has the advantage that it makes accessible to the widest circles the experiences which the legal profession alone is able to gain.

V

Mr. Plummer considers it as a ' gross injustice ' that under English law ' in the absence of express agreement, the landlord is not liable to repair the demised premises and that this rule even extends to outside repairs '.[44]

No lawyer trained in the tradition of the Continental laws will be inclined to disagree with this verdict. The duty of the landlord to maintain the property let by him in a proper state of repair was recognised already in Roman law. It has been adopted by all contemporary civilian systems.[45] It forms part of the semi-civilian laws of Scotland and South Africa.[46] Already Grotius makes it clear that the duty of keeping the property in a good state of repair followed from the duty of the lessor to let the property in a state fit for use :

> The hirer has the right to use the thing and, failing that, to be compensated for his interest. Further he may compel the lessor to maintain the property in good condition so that it admits of being used : this the lessor must do at his own cost : and if he is in default the lessee may spend money on the repairs and charge it against the rent.

The modern interpreters have followed this example. Thus the Austrian Civil Code merely states that the landlord is bound to ' deliver and maintain the property in a proper state of repair ',[47] and a similar rule is contained in many other Codes.[48]

Some restrictions of this liability of the landlord apply in the case of the tenancy of a farm which has been let on condition that the fruits of the farm are to be drawn by the landlord. Thus Scottish law imposes upon the tenant the burden of keeping houses and fences in the case of the tenancy of a farm in a proper state of repair.[49] Austrian law contains a similar, though somewhat more narrowly defined, rule.[50]

Another interesting exception from the principle is the rule

[44] *L.c.*, p. 48.
[45] Buckland, *l.c.*, p. 500; and Moyle, *Institutions*, 5th ed. (1912), p. 440, both with further references.
[46] Inleiding 3.19.12.
[47] Section 1096 (1).
[48] See *e.g.*, French Code Civil, Art. 1719 (2); German Civil Code, Art. 535; Swiss Code of Obligations, Art. 254 (1); Brazilian Codigo Civil, Art. 1189 (1), see further references in Zimmerle, *l.c.*, p. 320.
[49] Gloag-Henderson, *l.c.*, p. 358.
[50] Section 1096 (2).

contained in nearly all Codes,[51] according to which the tenant is responsible for a number of minor repairs. The legislative idea of this rule is that it would unduly spoil the relations between tenant and landlord, if the latter had to look after every little trifle that happened to the property which had been let. What is and what is not a minor repair is a matter for local custom to decide. The French Code contains in addition to this a long list —expressly stated not to be exhaustive—of those repairs which are considered as minor and which are therefore to be made and paid for by the tenant. The more modern Codes, however, have abstained from including a similar list and confine themselves to stating the principle.

Another restriction of the landlord's duty to effect repairs has resulted from the emergency legislation which has in some countries entailed the fixation of maximum rents. These have in general remained considerably below the general rise in prices.[52] In this situation the landlord could not any longer be expected to maintain the property in its original state, as the costs of repairs frequently have risen far beyond the limits set to the increase in rents by the emergency legislation. This explains why in a number of countries, but by no means everywhere, all or some repairs in respect of controlled houses must be effected by the tenant.

To the extent, however, to which the principle has remained in force, the Continental laws have incorporated a further protection for the tenant. The repairs may seriously interfere with the enjoyment of the property by the tenant. They may take considerable time. During this time the rooms let to the tenant may be practically uninhabitable. The French Civil Code provides that where repairs take more than forty days and cannot be postponed until after the termination of the tenancy, the rent must be decreased in proportion to the time taken by the repairs and to the interference with the tenant's enjoyment.[53] A similar conclusion is drawn in other laws from a more generally worded principle,[54] according to which in any case of defects becoming noticeable after the conclusion of the tenancy the tenant is entitled to a reduction of the rent and in certain cases even to terminate the tenancy.

VI

The next point dealt with by Mr. Plummer [55] is the question of the rights and duties of the tenant in case of accidental destruction of the house by fire or by some other inevitable accident. Under English

[51] Swiss Code of Obligations, s. 263 (2), French Code Civil 1754, Spanish Codigo Civil, Art. 1580, Brazilian Cod. Civ., Art. 1206 (2).
[52] See *e.g.*, Austrian Mietengesetz of 1922, s. 6 and Ehrenzweig, *l.c.*, p. 440.
[53] Art. 1724.
[54] German BGB, s. 537, Swiss Code of Obligations, Art. 255.
[55] I have dealt here with an aspect treated by Mr. Plummer, *l.c.*, p. 48 under two different headings.

law if demised premises are destroyed or damaged by fire or tempest or other inevitable accident, the tenant, if he has agreed to keep them in repair, in the absence of some such words as ' damage by fire or inevitable accident excepted ' is liable to make good the damage, even to the extent of completely rebuilding the premises if they are totally destroyed. And this is so even though the landlord has received insurance moneys of a policy insuring the premises. That is not all. The unfortunate tenant is liable to continue to pay rent although the premises are destroyed or damaged by fire or inevitable accident and the tenant's covenant to repair is not qualified by the words ' damage by fire or inevitable accident excepted '. Furthermore the liability to pay rent too is not affected by the fact that the landlord has received insurance moneys in connection with the loss which he has suffered. The attitude taken by the Continental laws to this problem is completely different from that of English law. There is, in fact, as far as I can see, no parallel to any of the rules of English law referred to by Mr. Plummer in any of the Continental legal systems.

Already in Roman law the position of the tenant in case of accidental destruction of the property let was very much more favourable than it is today in English law.[56] This was due to the general principle adopted by Roman law according to which it was the landlord's duty not merely to permit the use of the property to the tenant, but in fact to continually grant such use. Where the property was accidentally destroyed, there was subsequent impossibility of performance by the landlord and the consequence was that the tenant was not liable to pay rent.[57] The landlord was not bound to rebuild the property : the classical lawyers had too much common sense to draw so radical a conclusion from their general conception of the nature of tenancy. But where the destruction was due to the fault of the landlord he was liable in damages to the tenant.[58] On the other hand, of course, if the destruction was due to the tenant's fault he had to make good the damage and this might, of course, include a liability on his part to continue paying rent to the landlord. If the tenant had already paid rent to the landlord for the period during which owing to the accidental destruction of the property he was wholly or partly prevented from enjoying the use of the property, he was allowed to reclaim the money already paid by him. A classical lawyer, Fabius Mela, is credited by Ulpian with the interesting remark that a tenant who reclaimed in this way money paid by him to the landlord did not have to rest his claim on the ground of unjust enrichment.[59] If he had had to do so, he could have claimed only the amount by

[56] See Buckland, *l.c.*, p. 501 with further references.
[57] D. 19.2.60. pr. (Labeo).
[58] It is not impossible that in classical law the landlord was responsible in damages even in case of accidental destruction, see Buckland, *l.c.*, note 13.
[59] D. 19.2.19.6. On Fabius Mela see Kipp, *Geschichte der Quellen des Römischen Rechts*, 4th ed. (1919), p. 115.

which the landlord was still enriched. The claim, said Mela, followed directly from the relationship of landlord and tenant:

> non enim per errorem dedit plus, sed ut sibi in causa conductionis proficeret.

I cannot find any Roman authority which even considers the question whether a tenant who had covenanted to repair could be forced to rebuild in case of total accidental destruction. I am inclined to think that the question was never ventilated by the Roman lawyers. They had hardly an opportunity to do so: under Roman law as a rule the obligation to repair was upon the landlord; in general the distinction between impossibility of performance and the presence of defects was so strictly drawn that there was little danger that the distinction between repairing and rebuilding would be overlooked.

The Roman rules which have just been described have indeed stood the test of time well enough. They were received in Continental Europe in their entirety. Grotius says [60]:

> If the lessee is hindered in the enjoyment of the property by unforeseen accident such as fire, war, extraordinary failure of crops, or the like, the rent must be reduced in proportion to the extent and duration of the lost enjoyment.

The words 'failure of crops' in this connection are a brief, though clear, reference to another doctrine of Roman law which protects agricultural tenants against extraordinary climatic conditions.[61] Windscheid, at the end of the nineteenth century, could refer to the Roman doctrine as in force in its entirety. His own statement [62] of the law is still referred to as correct for the modern law of South Africa.[63] It is also still correct for the modern law of Scotland. Scottish law has recognised that accidental destruction of the property during the period of the tenancy is a case of subsequent impossibility of performance on the part of the landlord: *rei interitus* as Scottish legal terminology styles it. The consequence is that it 'puts an end to the obligation on either side', including the obligation to repair.[64] In dealing with the duty on the part of the tenant to pay the rent Scottish law follows the course set by Roman law.

There has not been much opportunity for the modern Codes to improve upon the legal rules received from the Roman sources. The Austrian Code [65] prescribes that the accidental destruction of the property results in the termination of the tenancy. Neither party is responsible to the other in damages. The landlord need not rebuild, the tenant need not pay rent. If, however, either

[60] Inl. 3.19.12 (at the end of the passage).
[61] See Buckland, *l.c.* This doctrine too has been received in the contemporary civilian laws.
[62] Windscheid-Kipp, *Pandekten*, s. 400, note 5.
[63] Lee, *Introduction to Roman-Dutch Law*, 4th ed., p. 302.
[64] Gloag-Henderson, *l.c.*, p. 358 and *Cameron* v. *Young*, 1908, S.C. (H.L.) 7.
[65] Sections 1104, 1112.

party is responsible to the other, such party is liable in damages. This is the old Roman rule. Similar rules will be found in the French Code Civil.[66] The French Code deals, however, explicitly with the question of the burden of proof in case of fire.[67] The tenant is under a duty to return possession of the property to the landlord. If the property has been destroyed by fire, the tenant must prove that the fire has been due to accident. If he cannot prove this he is responsible for the consequences of the fire. French legal authorities say that there is a presumption of law that the fire was due to the negligence of the tenant.[68] The older authorities refer in this connection to what can only be described as an obiter dictum of Paulus in one of his writings on the prefects of the night guards [69]:

plerumque incendia culpa fiunt inhabitantium.

If there are several tenants they are collectively responsible, except if they can prove that the fire started in the rooms inhabited by one of them or if one of them proves that it could not have started in his rooms.[70] The courts have, however, tried to lessen the rigour of these rules by the very lenient way in which they have interpreted them. They have held that the tenant has proved accidental destruction if he has succeeded in proving that the fire could not have been due to negligence on his part.[71] In such a case it was a necessary conclusion that the fire could only have been due to accident.[72] This interpretation was, however, rejected in two recent decisions by the Cour de Cassation. It was held that the tenant had actually to prove accident.[73] He was responsible in damages where the cause of the fire was unknown. There can be little doubt that this interpretation is better reconcilable with the text of the Code. It has been accepted by the majority of modern legal writers.[74]

The French rule has been incorporated in a number of other modern Codes, such as the Brazilian Code.[75] The Central European laws, however, have not followed this course. They had, in fact, no reason to do so. It is a general rule that a debtor who wants

66 Section 1722.
67 See on the following, ss. 1732–1734.
68 Planiol et Ripert, *l.c.*, p. 633, Colin-Capitant, *l.c.*, p. 602.
69 D. 1.15.3. The statement has clearly nothing to do with the relationship between landlord and tenant. It is merely mentioned in connection with police duties by a writer who, of course, knew his fellow-countrymen and was stating his experience, not a rule of law. But the older French authorities have raised the saying to the dignity of a rule of law and transposed it into the civil law, see Colin-Capitant, *l.c.*
70 See Planiol-Ripert, *l.c.* Colin-Capitant, *l.c.*
71 Douai, March 28, 1901, D. 1901.2.233; Orléáns, December 4, 1886, D.88.2.63.
72 Planiol-Ripert, *l.c.*, p. 635.
73 Civ. February 10, 1919. D.1921.1.193 with note by Lalou and Civ. February 17, 1930; Dalloz Recueil Hebdomad, 1930, 194.
74 Josserand, *l.c.*, p. 708, Colin-Capitant, *l.c.*, p. 602.
75 Art. 1208. The Spanish Code contains an even more far-reaching clause (Art. 1563) requiring the tenant to prove in the case of any deterioration or damage suffered by the property during the period of tenancy that he is not responsible for it. Note, however, that this too is a mere rule of evidence, not a rule of substantive law.

to plead that he is discharged from his liability by accidental impossibility of performance must prove that the impossibility is not due to his own fault. This rule applies to tenancy as it does to other contracts. The tenant is liable to return the property to the landlord. If the property is destroyed and performance of the duty to return the property is thereby rendered impossible, the tenant must prove that the impossibility is not due to his fault.[76] The Central European courts will in fact be considerably less exacting than the French courts in regard to the manner in which they require the tenant to prove absence of fault. But the legal principle as such is not very different from that applied by the French provincial courts before the recent return to stricter standards by the Cour de Cassation.

Another interesting question has occupied the Continental courts which again evidences the ease with which the codified rules are interpreted liberally where social needs or modern ethical conceptions require this. The destruction of the property, resulting as it does in impossibility of performance for the landlord, brings to an end the contractual relation between the parties, including the tenant's duty to pay rent. It is therefore an important question what is to be considered as destruction. The French courts, after some hesitation, have held that anything must be considered as destruction which prevents the use or enjoyment of the property by the tenant, apart, of course, from circumstances connected with the person of the tenant.[77] Similarly, the Austrian courts have held that a house that was liable to collapse on the ground of sheer old age must be treated as if it had been destroyed.[78] This interpretation which—at least from a functional point of view—appears to be the most reasonable one has brought the question of destruction and of impossibility of performance into the immediate neighbourhood of another rule, where in fact it clearly belongs : the implied warranty of the landlord that the property is free from defects preventing its enjoyment by the tenant. The rule that the landlord is not entitled to demand payment of rent if the enjoyment of the tenant is disturbed by defects, even though he did not know of these defects, receives a further justification from the fact that the payment of rent also ceases in case of accidental destruction of the property. And, as has been shown, the boundary line between impossibility of performance and the warranty of absence of defects cannot be very rigidly drawn.

It will be seen from what has been said that the Continental laws, in dealing with the problem of destruction of property let to tenants, were throughout guided by principles very different from those which led the English courts into imposing upon the tenant

[76] German Civil Code, s. 282; Austria: Ehrenzweig, *l.c.*, p. 298, note 31. Switzerland: von Tuhr, *Allgemeiner Teil des Obligationenrechts* (1924), pp. 514 ff. and s. 97 Code of Obligations.

[77] Civ. November 22, 1922, D.1925.1.213 against Req. March 5, 1850, D.50.1.68.

[78] Ehrenzweig, *l.c.*, p. 441.

the duty to pay the rent of a building which has been destroyed and to reconstruct a building which he had undertaken to repair. In this connection another consideration is of interest. As has been seen under the Continental legal systems the landlord is bound to repair the property, even though he has not expressly promised to do so.[79] On the other hand the duty to repair does not include the duty to rebuild. The same applies of course to the tenant. If the tenant has promised to repair and the property is destroyed, he is not bound to rebuild. All this is elementary under the Continental legal systems. It is recognised everywhere.

But generally the Continental courts show some inclination to interpret restrictively clauses by which the tenant has undertaken to bear certain risks. The Austrian Code contains an interesting rule of interpretation :

> A tenant who has generally taken over all risks is understood to have taken over the risks of damage by fire, water and weather only. Other extraordinary damages are not covered by this undertaking. If, however, he has expressly undertaken to be responsible for all other extraordinary accidents this is not understood to mean that he is responsible for the accidental destruction of the entire property.[80]

Only in exceptional cases has a duty on the part of the landlord been recognised to rebuild a house that has been partly destroyed. In German law this duty is said to exist in cases in which the reconstruction of partly destroyed premises can be effected without a great deal of expenditure and during the period of the tenancy and where after the reconstruction the property can still be considered as identical in an economic sense with the property that has formed the object of the tenancy.[81]

It will be seen from these remarks—scanty enough in the face of the vast material that is available—that the position of the tenant in the Continental legal systems is very much better protected in the case of accidental destruction of the property than it is under English law. Though there are not inconsiderable differences between them the tenant is nowhere under a liability to continue paying rent after the destruction of the property. The French rule imposing upon the tenant the burden of proof in connection with accidental destruction has, however, had the remarkable consequence that in France and the countries where similar legal rules obtain, it is as a rule the tenant who insures the property against accidental destruction and not the landlord.[82] The problems which arose in this country where the landlord and not the tenant is insured

[79] See p. 387, above.
[80] Art. 1106.
[81] See Planck-Knoke, *Kommentar zum Bürgerlichen Gesetzbuch*, 4th ed. (1928), s. 536, note 1; Oegg, in *Kommentar der Reichsgerichtsräte*, s. 536, p. 202, both with further references.
[82] See Planiol et Ripett, *l.c.*, pp. 637 ff. also for a statement of some of the legal difficulties experienced in connection with this type of insurance.

against fire have therefore not arisen in France, so that the French courts have never been faced with those problems which were solved in this country by the rule in *Leeds* v. *Cheeham*, whose abolition Mr. Plummer — in my view with convincing arguments — has recommended.[83]

VII

The last point is referred to by Mr. Plummer in these words [84] :

> Even where a landlord has either expressly or impliedly agreed to repair, he will not be liable to anyone (other than the tenant) who suffers injury by reason of the property being out of repair.

He then refers to the well-known case of *Cavalier* v. *Pope*,[85] in which it has been held that the tenant's wife could not claim damages for injuries obtained in consequence of the landlord's failure to repair a house which he had expressly promised the tenant to repair. The tenancy constitutes a contractual relationship between the tenant and the landlord from which the tenant's wife cannot possibly benefit.

From a purely practical point of view it is perhaps not necessary to dwell at great length on this problem. *Cavalier* v. *Pope* is clearly inconsistent with the rule in *Donoghue* v. *Stevenson*. It is clear that if the same case were to be decided today as a case of first impression, it would be decided differently. The principle of *Cavalier* v. *Pope* has been given up—though somewhat hesitatingly —by the American Restatement.[86] It has been disapproved wholly or partly by learned writers on the law of torts.[87] It is hardly to be expected that it will offer a great deal of resistance to the advance of reform. If, nevertheless, I comment on it at some length, I do so merely in order to show that the hesitation of the American Restatement is not justified and in order to give my readers an example of the extent to which the Continental laws have recognised for a very long time rules which are now advocated in this country as demanded by the latest turn of social development.

Two institutions of Roman law have enabled the Continental laws to find a satisfactory answer to our problem, though neither of them at first glance would show much similarity with modern ideas or modern solutions. These institutions constitute, so to speak, the germ. Between them and the modern laws there lies a long road. The first of these institutions is the *lex Aquilia de*

[83] (1827), 1 Sim. 146.
[84] *L.c.*, p. 49.
[85] [1905] 2 K.B. 752.
[86] *Restatement of the Law of Torts*, s. 358.
[87] See Winfield, *Law of Torts*, 3rd ed. (1946), pp. 543 ff., Glanville Williams, 'The duties of non-occupiers in respect of dangerous premises', *Modern Law Review*, Vol. 5 (1942), pp. 194 ff.

damno,[88] an enactment of the third century B.C., in which the owner of property was given the right to compensation in the case of 'burning, breaking and destroying' (*urere*, *frangere*, *rumpere*) of his property. This law has been the starting-point of a development, that began already in the classical law, was continued in the post-classical period and has found its further continuation in the post-reception period and in modern times. It was extended from the three types of actions to any type of action, from the direct physical damage done to property to any type of damage to property and also to damage done to human beings, from damage by way of positive action to damage caused by omission.[89] In short it became the great fundamental all-embracive rule, embodied in all the modern codifications, known to all civilian lawyers as the principle of delictual liability for fault and expressed in the terse language of the Code Civil in words which at the same time sum up the learning of libraries and have formed the basis for libraries of new learning[90]:

> Tout fait quelconque de l'homme qui cause à autrui un dommage oblige à celui par la faute duquel il est arrivé, à le réparer.

This principle—which has, of course, rendered the Continental law of torts much less bulky than the English learning on this topic can ever be—knows of no such exception as the rule in *Cavalier* v. *Pope*. Such an exception would be contrary to its very spirit. As a distinguished South African jurist has said[91]:

> The chief function of the Aquilian action is still, as in the Roman and Roman-Dutch law, to give redress for acts involving physical injury to the person or property. Every person has a right that others shall take due care not to cause physical injury to his person or property and that involves a duty on their part to observe such care. A similar rule obtains in English law. But in English law the rule is subject to two exceptions. Thus in English law no duty is owned by an occupier of dangerous premises towards trespassers. Nor is any duty cast upon a vendor or lessor of a house in respect of defects in the property rendering it dangerous or unfit for occupation. Such anomalies form no part of our law; in our law the duty is one of universal obligation.

[88] Buckland, *l.c.*, pp. 585 ff., Jörs-Kunkel, *Römisches Recht*, 2nd ed. (1935), pp. 356 ff. It is significant for the historicistic attitude of what Koschaker in *Europa und das Römische Recht* (1947) has styled the neo-humanistic school in romanism that none of the contempory students' text-books on Roman law, no matter whether English, French or German, has found it worth while to tell its readers anything about the story of the influence of the lex Aquilia on the modern laws. Their interest fades out at best with Justinian, at worst with the classical law. Unfortunately the modern lawyer reads law books in order to know either about the law that he applies or about its background. A science that is unable to link up with either, has no meaning for him.

[89] See the summary, impressive in its brevity, in Windscheid, *l.c.*, s. 455.

[90] Section 1383.

[91] MacKerron, *The Law of Delicts*, 3rd ed. (1947), pp. 22 f.

Of course, if the accident is due not to a positive action on the part of the landlord—such as a faulty manner of carrying out repairs—but to his omission to have repairs carried out, not everybody can demand damages from the landlord. Though there is a universal obligation to use care in respect of positive actions, an omission to act does not create a liability except if a duty to act was first brought into being. Such a duty to act may be relative. In the case of a landlord it exists only as against those persons who come—as the French jurists say—' pour des motifs plausibles ', not as against those who come for other reasons.[92] The Continental laws do not recognise the rigid distinction between trespassers, licensees and invitees.[93] Nor do they assume that a landlord is discharged from his liability towards those who enter his house in consequence of the fact that he is not himself the occupier. That the landlord is responsible to the wife of the tenant if through his fault there has been an omission to provide for repairs, is so free from doubt that the usual French textbooks fail to mention the problem.

French law, like the law of South Africa and other Continental laws, require, however, in cases of this type a fault on the part of the landlord. It would be futile to enter here into a discussion of the meaning of this term, which an eminent French jurist [94] has called ' une des notions les plus vagues, les plus fuyantes qui existent dans l'ordre juridique '. But it is clear from the course of legal history that there are cases in which there is need for a liability not based upon ' fault ', but resulting simply from the facts of the case. In this development the question of the landlord's responsibility for damages caused by the faulty condition of his house has played a most notable part. Here, too, a Roman institution was the starting point. In Roman law a person who had suffered damage in consequence of the faulty condition of real property could claim damages from the owner of the property, if he had obtained before the damage occurred a promise of compensation for such damage from the owner or a judicial order of indemnification against him. This is the institution usually referred to as *cautio damni infecti*. In the later development this Roman idea was combined with the Germanic idea of responsibility for dangerous property, referred to as 'théory de la risque créée' by French jurists and as 'Gefährdungsprinzip ' by German lawyers. This led to the recognition in varying degrees of strictness of the principle that the owner of a house is responsible for damage caused by the faulty condition of his house.[95]

[92] See *e.g.*, D. 1914.1.39, and S. 1904.1.320.

[93] Lee, *l.c.*, p. 325 for South African law, Scottish law is the only one of the civilian systems which has fallen under the spell of the English rules, see Gloag-Henderson, *l.c.*, pp. 385 ff.

[94] Josserand, *l.c.*, p. 240.

[95] See the exhaustive summary by von Caemmerer, ' Haftung für Gebäudeeinsturz ', in *Rechtsvergleichendes Handwörterbuch*, Vol. 4 (1933), pp. 77 ff.

French, German and Austrian [96] law contain the principle in rules which are all constructed on more or less the same lines. The owner of a house or of another structure firmly connected with the ground is answerable without proof of any fault on his part for any damage resulting from the collapse of the house or structure or from the separation of individual parts from it, provided the collapse or the separation is due to the faulty construction or the unsatisfactory state of repair of the house or structure. Some modern Codes provide that the owner can exculpate himself, others do not allow him to do so. The details do not matter in the present very rough description.

It is, however, to be noted that at least one modern Code,[97] *i.e.*, the Swiss Law of Obligation, has gone much further and converted the rule into a sweeping principle of liability, much more far-reaching than any of the older codifications provided. Section 58 of that Code reads as follows :

> The owner of a building or of any other structure must pay compensation for damage, caused by it in consequence of faulty planning or construction or of its being in a bad state of repair.
> He retains the right to obtain redress from others who are responsible to him.

This article covers, of course, fully the problem of the *Cavalier* v. *Pope* type of case. It renders the landlord responsible without regard to whether he has been negligent or not. The interpretation by the Swiss courts has on the whole been disinclined to narrow down its scope. Thus the Swiss Federal Court has held that the lack or the faulty condition of life belts in a lake swimming bath must be considered as a faulty state of repairs of the bath, for which the owner is responsible.[98] It has been applied to the state of repairs of a lift.[99] It has been held that, though a tenant may in advance renounce his rights under section 58, such renunciation may in the discretion of the court be treated as inoperative.[1] The only practically important limit set to the application of the section is that it does not apply to damage caused by the fact that the house is in the course of being repaired or rebuilt or converted : section 58 only provides a liability for dangers arising out of the permanent condition of the house, not out of any temporary and exceptional condition into which it may have been put.

It remains to report on an interesting development in respect of

[96] Code Civil, Art. 1386, Austrian ABGB, s. 1319, German BGB, s. 836. On the further—less prominent—institution of actio de effusis et ejectis whose modern history has been much less distinguished than that of the cautio damni infecti I must refer to von Caemmerer's article.
[97] Art. 58.
[98] *Official Reports*, Vol. 55 II, p. 196.
[99] *Official Reports*, Vol. 41 II, p. 688.
[1] This decision, of February 7, 1933, has not been published but is referred to in Daeppen, *Bundesgerichtspraxis zum Obligationenrecht* (1936), p. 159.

the *Cavalier* v. *Pope* problem which has taken place under German law. In German law the rules of delictual liability differ more strongly from those of contractual liability than they do in most other Continental legal systems. Above all in German law the owner of a house may always exculpate himself for any delict committed by his servants, if he can prove that he applied the necessary care in selecting, placing and supervising them.[2] Thus a commercial corporation owning a number of blocks of flats could in defence to a claim for damages arising out of the bad state of repairs of a stair carpet in one of them plead that their manager for the particular building had been selected with care, was fit to be in charge of such a house and that there had been a proper check on conditions in the house by the responsible officers of the corporation. This and other peculiarities of delictual responsibility made it necessary for relatives of tenants to try to find a construction which enabled them to claim that their rights to receive compensation were not delictual, but contractual in character. Their attempts were successful. Under German law—which in this respect differs not only from English, but also from French and other Continental laws—contracts in favour of a third party are both permitted and very usual.[3] There is no restriction whatsoever upon such contracts. They are in every respect treated like other contracts. As other contracts can be concluded by implication, so can contracts in favour of third parties. It was therefore possible to hold that a tenant who had concluded a tenancy agreement had done so not merely for his own benefit, but also for the benefit of his wife, his children, his servants and whoever else was expected or likely to share his accommodation with him, such as relatives permanently living with him. This construction has been approved by the Supreme Court,[4] though it has been held not to be available to mere guests, to the cleaners employed by the tenant[5] or in the case of a tenancy of business premises to the tenant's staff.[6] It has even been held that the State is liable to the wife of a civil servant who occupies official quarters, which had not been properly disinfected after a contagious disease contracted by the wife of a former tenant.[7] It will be seen that the protection granted by German law fully covers the *Cavalier* v. *Pope* type of case.

2 Section 831 Civil Code.
3 Section 328.
4 Decision of January 17, 1913, *Official Reports in Civil Matters*, Vol. 81, p. 214.
5 Kammergericht (Appeal Court of Berlin), Decision of July 29, 1937, *Juristische Wochenschrift*, 1937, p. 252.
6 Plank-Knoke, *Kommentar zum BGB*, 4th ed. (1928), Vol. 2, Pt. 2, p. 806; see, however, Reichsgericht in Jurist. Wochenschrift, 1935, p. 1768, where it was held that the landlord was responsible to the tenant's son who was his father's assistant in his business and suffered an accident due to the faulty condition of the business premises.
7 Decision of October 5, 1917, *Official Reports in Civil Matters*, Vol. 91, p. 21.

VIII

Those of my readers who have had the patience to follow me so far may perhaps be inclined to say that all that I have said has had little or no bearing on the problem of the demands advocated by the reform group. They might say that what I have said merely shows that the Continental laws have adopted a different view on the principle of the nature and conception of tenancy. Under the Continental laws, it is clear, the contract of tenancy entails a permanent duty on the part of the landlord to warrant the enjoyment of the property by the tenant to the extent and in the way envisaged by the parties at the time when the agreement was concluded. English law, it might be said, has for better or for worse chosen a different conception. The relation between landlord and tenant under English law is an estate. It is formed by a grant on the part of the landlord. As such it is part of the law of property, not of the law of obligations. It entails duties on the part of the tenant, but not as a rule on the part of the landlord. In this respect there is a remarkable parallel between it and the contract relating to the hire of chattels. For this contract too imposes upon the letter no other duty but that of allowing the hirer to use the chattel.[8] There is, it might be said, more in the difference between the English law and the Continental legal systems than meets the eye : it is not a difference relating to individual legal rules which can easily be shaped and adapted to novel demands. It is a difference that goes to the root of fundamental conceptions.

In principle, I am inclined to think that it is indeed correct that the Continental laws have chosen a different basic conception on which they have built up their system of the law of landlord and tenant. To this extent it must therefore be admitted that the objection to which I have just referred is well founded. Yet I think that from any but a purely conceptionalist point of view there is little force in it. Conceptions, after all, are merely an abbreviated manner of speaking of legal rules. If a small number of insignificant legal rules are amended, the conceptions do not require adjustment. The larger the number of legal rules affected by the amendment and the greater their functional importance, the more necessary is an adjustment of the conceptions formed to express in an abbreviated form the contents of the rules. Concepts like rules change with the course of legal development. They possess no eternal value. Only the ethical, logical, economic and practical considerations motivating the rules can be considered as an argument for or against the amendment. That the amendment may necessitate a change in the conception is a consequence of, not an argument against, the demand for reform. Not *ex regula ius fiat*, but *ex iure regula*.

[8] *Readhead* v. *Midland Ry.* (1869), L.R. 4 Q.B. 379.

IX

It remains for me to add one very brief remark. Mr. Plummer ended his article with an appeal to lawyers to study in addition to the analytical and historical aspects of the law its functional character. I venture to submit that in this study comparative law forms an indispensable element. Justice is an infinite goal which man can only aspire to reach—he will never reach it fully. Because the task of doing justice is so difficult, it is important to pool the knowledge and experience which mankind has gained in its quest for justice. Comparative law is the science that attempts this pooling.

E. J. Cohn.

PLANNING AND DEVELOPMENT UNDER THE TOWN AND COUNTRY PLANNING ACT, 1947

'. . . in the Middle Ages, the land law, because it was the most important branch of English law, was the most highly developed and the most technical part of the common law; . . . and . . . its condition was typical both of the merits and defects of the common law of that period . . . its rules and doctrines were too narrow, and obviously large developments of, and additions to, its rules and doctrines were needed to bring them into conformity with the new political social and economic ideas and wants of the modern English state. The adaptation of this highly developed and technical body of law to the changed world which was opening in the sixteenth century was a difficult task. . . . If the common lawyers had been unable or unwilling to rise to the occasion, some of the many courts which administered bodies of law, which were competing with the common law, would have supplied the want of an up-to-date land law, and would thus have gone far to deprive the common law of its control over the development of the modern law. Fortunately for the common law the political strength of the common lawyers, and their technical skill, averted this danger. They rose to the occasion; retained their control of the land law; and, on the foundation of the mediæval land law, erected, with the help of the Legislature, the elaborate superstructure of the modern law.' [1] 'Even after the reforms of the nineteenth century, it has remained the most technical and complicated branch of English law, and the least suited to the needs of the twentieth century.' [2] Sir William Holdsworth wrote these passages in 1925 in his conclusions on the land law, *i.e.*, before this country, or rather the whole world, had suffered the torments of the second world war, and what was true in 1925 had become doubly true some twenty years or so later. The serious problems created or intensified by that war demanded, for their satisfactory solution, great and fundamental changes in English land law. The post-war 'political, social and economic ideas and wants of the modern English state' made it imperative to alter the English concept of landowning. To adapt Holdsworth's phrase, with the growth of the extent and pretensions of the State, and with the growth of collectivist society, other ideas of land ownership arise.[3] These ideas are strongly opposed 'to the

[1] Holdsworth, *History of English Law*, Vol. VII, p. 398.
[2] *Ibid.*, p. 399. See also Maitland's 'Essay on the Law of Real Property', *Collected Papers*, i, 162–201.
[3] Holdsworth, *History of English Law*, Vol. II, p. 72. The words 'collectivist society' have been substituted for 'feudal conditions' in Holdsworth's phrase. Time will show whether the two expressions mean the same thing.

individualistic point of view from which the law has long regarded those who have rights in the land ',[4] and the reasonableness of such views can be tested by applying facts. As the Scott Report [5] pointed out, of all European countries England heads the list with 766 persons per square mile, with Germany and Italy at less than half that density, and France approximately a quarter of it, the United States of America having only forty-three persons per square mile. Not only that, but over one-third of the population in England lives in only six cities, and over one-half of the population in only fourteen of the chief urban centres. Further, between 1925 and 1937 the annual loss of agricultural land was approximately 800,000 acres, and it is believed that this annual loss is increasing, whilst there is no doubt that the population is increasing. And we have only 50,000 square miles to cater for our requirements, an area only one-sixtieth of that of the United States of America (3,000,000 square miles). It is clear from these facts that there must be keen competition for every inch of land in England. If justice is to be done to the population, considered as a whole, there must be machinery for adjusting competing claims, and in the case of conflicting claims, national, and not individual, interests must prevail. This is the basis of the Town and Country Planning Act, 1947. One gets a clear picture from the Explanatory Memorandum [6] published at the same time as the Town and Country Planning Bill, 1947. There it is stated that the object of town and country planning is to secure that all the land in the country is put to the use which is best from the point of view of the community, and that planning operates to achieve this by controlling changes in the use of land, by securing that development of the right kind takes places, and by eliminating wrong uses. It goes on to state that an adequate planning system must, therefore, provide for three things :—

(i) the making of plans, *i.e.*, settling the policy on which land is to be allocated among the various uses;

(ii) the administration of planning control (or control of development), to secure that when an owner wishes to change the use of his land the new use is in accordance with the plan; and

(iii) positive action to promote the execution of the plan.[7]

We shall see later that the 1947 Act does provide for these three things. But there is one matter to which reference should be made at this stage, and it is this. All three things are matters of policy, involving administrative action. There is nothing judicial about them, and the ordinary courts are not concerned with them. The courts, it is respectfully submitted, have adopted the right attitude in matters arising in this sphere of public law. See, for example,

[4] *Ibid.*, p. 73.
[5] Report of the Committee on Land Utilisation in Rural Areas, No. 6378 of 1942.
[6] Cmd. 7006 (1947).
[7] *Ibid.*, para. 3.

the decision of the House of Lords in *Franklin* v. *Minister of Town and Country Planning*.[8]

Turning now to the Act itself, as was to be expected, it is a lengthy and complicated piece of legislation, running to 120 sections and eleven schedules, but it appears to have been well drafted. It is an Act which Dr. C. K. Allen would most probably call a skeleton, as it contains the bare bones, the flesh and blood taking the form of ministerial orders and regulations. It is very important, therefore, for any person who may have to advise on town and country planning to make certain he is basing his advice on the latest ministerial edict. The provisions of the Act dealing with the creation and constitution of the Central Land Board,[9] and its functions [10]; the compulsory acquisition of land before a development plan becomes operative under the Act for the purposes of the Post Office or of any of the functions of the Minister of Works [11] or for any purpose which appears to the Minister to be immediately necessary in the interests of the proper planning of that authority [12]; Part V, enacting amendments of the law relating to compensation for compulsory acquisition of land; so much of section 91 as relates to land acquired before July 1, 1948; and section 113 (2), so far as it relates to the repeal of the enactments set out in Part I of the Ninth Schedule, which came into force on August 6, 1947, the date of the passing of the Act,[13] and the remainder of the Act came into force on the appointed day, *i.e.*, July 1, 1948.[14] Except as regards the provision that the sum of £300,000,000 to be paid to landowners for depreciation of land values is to be apportioned between land in England, Scotland and Wales,[15] and that the Central Land Board covers Scotland as well as England and Wales,[16] the Act does not apply to Scotland.[17] Nor does it extend to Northern Ireland.[18] In other words, the Act only applies to England and Wales. Section 115 deals with the application of the Act to the Isles of Scilly.

It is impossible in one article to deal with the whole Act, and therefore a choice of topics must be made. The present writer's choice has fallen upon (a) the system of planning under the Act; and (b) control of development, as these appear to him to be amongst those matters of most concern to the landowner at the

[8] [1948] A.C. 87.
[9] S. 2.
[10] S. 3.
[11] S. 37 (2).
[12] S. 38 (2).
[13] Proviso to s. 120 (2).
[14] S. 120 (1) and the Town and Country Planning Act, 1947 (Appointed Day) Order, 1948; Statutory Instruments, 1948, No. 213.
[15] S. 58 (2) and s. 120 (3).
[16] S. 2 and s. 120 (3).
[17] S. 120 (3). The corresponding Act for Scotland is the Town and Country Planning (Scotland) Act, 1947, which received the Royal Assent on August 13, 1947.
[18] S. 120 (4).

present time. Public law aspects of the Act have been summarised by Mr. S. de Smith, and reference should be made to his article,[19] in which he specifically deals with the Central Land Board. The Minister has exercised his power under section two to make regulations for the appointment of members of the Central Land Board, their tenure and vacation of office, and the execution of instruments by the Board and proof of documents purporting to be executed, issued or signed by the Board.[20] These Regulations, too, provide that a member of the House of Commons shall be disqualified for being appointed to or being a member of the Board so long as he is a Member of Parliament, and that every member of the Board who is in any way, whether directly or indirectly, interested in any land which is the subject of a claim or application to the Board, shall disclose the nature of his interest to the Board, and shall take no part in any deliberation or decision of the Board with respect to that claim or application. The member's disclosure has to be recorded in the minutes of the Board.

We will now deal with the chosen topics.

THE SYSTEM OF PLANNING UNDER THE ACT

One of the objects of the Act is to introduce a new planning system including new powers to control outdoor advertisements.[21] The main defects of the planning system in force up to July 1, 1948, were that it was static; too localised; placed no enforceable obligation on local planning authorities to prepare schemes; and was of a negative character.[22] The old system was based on the Town and Country Planning Act, 1932; the Town and Country Planning (Interim Development) Act, 1943, which extended interim development control throughout the country and enabled the Minister to override decisions of local authorities; and the Town and Country Planning Act, 1944, which conferred positive powers for the replanning and rebuilding of areas of extensive war damage and of bad layout and obsolete development. These Acts are repealed, except that parts of the 1944 Act have been amended by the 1947 Act, and such parts (reprinted as so amended) constitute the Eleventh Schedule to the 1947 Act. This Eleventh Schedule deals with the purchase of licensed premises and with certain powers of local authorities, and consequently, in view of the choice of topics, falls outside the scope of this article.

The number of local planning authorities has, presumably in the interests of efficiency, but also because the new system is to

[19] (1948), 11 Mod.L.Rev., pp. 72–81.

[20] The Central Land Board Regulations, 1947 (S.R. & O., 1947, No. 2294).

[21] Town and Country Planning Act, 1947, Explanatory Memorandum, Part I, General Notes, p. 5. It is a pity that Part II of the Memorandum, containing detailed notes on each section of the Act (with index), has only just been issued, especially as this would have helped to allay the Minister's concern at the lack of knowledge of the Act by the general public.

[22] Para. 8, Cmd. 7006 (1947).

have a national, as opposed to a local, approach to planning, been drastically reduced. The present number is 145,[23] and local planning authorities are now the London County Council for the administrative county of London (which includes the City of London),[24] and the county councils and the county borough councils for the remainder of England and Wales.[25] The Act contains special provisions giving certain powers to the Common Council of the City of London and the various Metropolitan Borough Councils.[26] If it appears expedient to the Minister[27] that a joint board should be established as the local planning authority for the whole or any part of the areas of any two or more counties or county boroughs, he may make those areas or parts a united district for planning purposes and set up a joint board as the local planning authority for that district, but unless all the councils concerned consent to the Minister making the necessary Order, he cannot make it except after holding a local inquiry,[28] and he must then lay the Order before Parliament, either House having the right to annul the Order within forty days after the laying.[29] The constitution of such a joint board must be on the lines indicated in Part I of the First Schedule to the Act.[30] The Minister has power to make such Regulations as appear to him to be necessary or expedient for transferring to the new local planning authorities the property and liabilities held and incurred by county district councils and joint planning committees in connection with town and country planning under the old legislation, and for providing for payment of compensation to officers of the old bodies responsible for town and country planning who suffer loss of employment or loss or diminution of emoluments consequent upon the passing of the 1947 Act.[31] The expression 'emoluments' is not defined by the Act, but was judicially interpreted in *R.* v. *Postmaster-General*,[32] and statutory definitions appear in the Local Government Act, 1933[33]; Police Act, 1946[34]; and the Fire Services Act, 1947.[35] The courts, of course, are not bound to adopt any of these definitions when interpreting the Town and Country Planning Act, 1947. Section 34 of the Act gives the Minister power to make regulations for the delegation of functions of the local planning authorities to county

[23] See *ante*, p. 74.
[24] S. 114 (1).
[25] S. 4 (1).
[26] S. 114.
[27] 'Expediency' is not a matter with which the ordinary courts are concerned, and the Act appears to make the Minister the sole judge of whether or not a joint board should be established.
[28] S. 4 (2).
[29] S. 4 (3).
[30] S. 4 (4).
[31] S. 101.
[32] (1876), 1 Q.B.D. 658; (1878), 3 Q.B.D. 428.
[33] S. 305.
[34] Ss. 10 and 11.
[35] Fifth Schedule, para. 14.

district councils, and he has exercised this power by making the Town and Country Planning (Authorisation of Delegation) Regulations, 1947,[36] which permit a local planning authority, with the Minister's consent, to enter into an agreement with any county district council in its area, to delegate to the latter any of their functions relating to the control of development (Part III of the Act) upon the terms and conditions set out in those Regulations. The allocation of the functions created by the Act among the different authorities is fully set out in Appendix A of Part I—General Notes —of the Explanatory Memorandum on the Act.

In addition to the local planning authorities, the other bodies concerned in the carrying out of the provisions of the Act are the Minister himself, and the Central Land Board.

Positive duties are put upon all local planning authorities. Every one of them has, by July 1, 1951, or within such extended period as allowed by the Minister in any particular case, to carry out a survey of their area and to submit a report of the survey to the Minister together with a development plan, indicating the manner in which they propose that land in their area shall be used, and the stages by which any development should be carried out.[37] The Minister has issued a Circular (No. 40) containing notes of the matters and things to be kept in mind to ensure that development plans are as helpful as possible. The Circular gives guidance to local planning authorities as to the material they should collect locally, and the information they can assume Government departments will supply. When it is mentioned that the notes cover (inter alia) physical conditions (including existing land use, age and condition of buildings, quantities of building uses, residential density and land unsuitable for building purposes); industry and employment; agriculture and forestry; public utilities (*e.g.*, water, gas and electricity supply, sewerage and land drainage); and communications (*e.g.*, roads, railways, docks, airfields), it will readily be understood what a gigantic task the preparation of the survey is, and that the utmost co-operation between all interested parties will be essential if the job is to be done satisfactorily. It is obvious, too, that persons who are now or who will be engaged in town and country planning should have high qualifications, and it is gratifying to know that this aspect is having the serious consideration of the Minister, who, according to the daily press, has set up a committee to inquire fully into the matter. The Minister himself, when speaking on the second reading of the Bill, said : ' I attach the greatest possible importance to this survey, which will present a reliable and detailed analysis of the community from every aspect, and an estimate of its future growth and needs. Without this survey no plan can be of any real value. It will need the co-operative effort of economists, geographers, sociologists and other

[36] S.R. & O., 1947, No. 2499.
[37] S. 5.

professions to secure that all the facts about the area are known, including the characteristics and wishes of the people. Here there is room for considerable scientific research and the fullest possible collaboration with the universities. A new type of planner will have to be trained to carry out this broader conception of planning, and I am confident that the universities will recognise the importance and urgency of the matter, and fully play their part both in research and in training'.[38] May one add that one hopes that the Minister will recognise the importance of the research and training for which the universities will be responsible, and will regard them as real partners in this venture of democratically ascertaining the actual needs of the community. It is known that the Central Economic Planning Staff is recruited partly from the universities and partly from the civil service, which indicates that the Government is aware of the importance of the universities.

The Minister has power to approve any development plan with or without modification, but if the development plan designates any land as subject to compulsory acquisition and it appears to the Minister that such acquisition is not likely to take place within ten years from the date of approval of the development plan (seven years for agricultural land) then he cannot approve the development plan.[39] Neither can he, without the consent of all interested parties, approve a development plan subject to a modification designating as subject to compulsory acquisition any land not so designated on the plan submitted to him,[40] while safeguards are provided in the case of land belonging to local authorities and statutory undertakers, and of inalienable land of the National Trust, being designated in the development plan as subject to compulsory acquisition where the appropriate body objects to such designation.[41]

There is a statutory duty on a local planning authority to consult with the appropriate county district councils before preparing a development plan, or proposals for altering or adding to any such plan, and it must, before submitting any such plan or proposals to the Minister, give those councils an opportunity, to make representations and consider such representations.[42] The Minister has power to make Regulations as to the form and content of development plans, and the procedure to be followed for the preparation, submission, etc., of such plans,[43] and it is understood that he is making the Town and Country Planning (Development Plans) Regulations, but copies were not obtainable from H.M. Stationery Office at the time this article was written. If the Minister is of opinion that the local planning authority or any other authority

[38] 432 H. of C. Official Report, 962–963.
[39] S. 5, and proviso (*a*) to that section.
[40] Proviso (*b*) to s. 5.
[41] Proviso to s. 5.
[42] S. 10 (1).
[43] S. 10 (2).

or person ought to be consulted before he decides whether to approve, make, or amend the development plan, then he has to consult that authority or person, but he is under no obligation to consult any other authority or person, or to afford any opportunity for further objections or representations or to cause any further local inquiry or other hearing to be held.[44] These are important provisions from the point of view of the landowner, as they exclude any possibility of his invoking the aid of the decision in *Board of Education* v. *Rice*,[45] and he should also remember that, notwithstanding the wording of the section, the Minister has not personally to have the consultation. As was said in *Carltona Ltd.* v. *Commissioners of Works*,[46] 'In the administration of government in this country the functions which are given to Ministers (and constitutionally properly given to Ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them . . . The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them'. It is a matter of opinion, of course, whether the substitution of Parliament for the courts as the forum for complaint is a move in the right direction. When the Minister has approved or made the development plan the local planning authority has to publish a notice to that effect, and must name a place where a copy of the plan may be seen at all reasonable times.[47] Any person aggrieved by the development plan can question its validity on two grounds only, *viz.*, (a) that the plan is not within the powers of the Act; or (b) that any requirement of the Act or any Regulation made under the Act has not been complied with; and he must make application to the High Court within six weeks from the date of the notice just referred to.[48] Having regard to recent judicial decisions it will be extremely difficult, if not impossible, to satisfy the courts that the development plan should be quashed so far as the applicant's property is concerned, especially as in the case of ground (b) the applicant has to satisfy the court that his interests have been substantially prejudiced by the failure to comply with the requirement of the Act or Regulation.[49] Landowners should keep in mind the judgment of Lord Greene, M.R., in *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health*,[50] where, in dealing with what he described as the 'hybrid functions' (*i.e.*, quasi-judicial and administrative functions) of the

[44] S. 10 (3).
[45] [1911] A.C. 179.
[46] [1943] 2 All E.R. 560, at p. 563.
[47] S. 11 (1).
[48] S. 11 (2).
[49] S. 11 (2) (*b*).
[50] [1947] 2 All E.R. 395.

Minister of Health, he said ' It is manifest that, in the operation of hybrid functions of that kind, no perfectly logical result is to be expected '.[51] It is suggested that the judgments in that case must be kept well in mind by all landowners if and when they contemplate objecting to development plans, as the judgments emphasised once again that ' . . . it is the function of the Minister to consider the rights and the interests of the public. That by itself shows that it is completely wrong to treat the controversy between objector and local authority as a controversy which covers the whole ground. It is in respect of the public interest that the discretion that Parliament has given to the Minister comes into operation '.[52] Public interest now has considerable priority over private rights. Apart from the said two grounds, a development plan cannot be questioned in any legal proceedings whatsoever, and it becomes operative on the date of first publication of the said notice.[53]

Landowners should note, too, that *any* person duly authorised in writing by the Minister or by a local planning authority may, at any reasonable time, enter upon any land for the purpose of surveying (which includes power to search and bore for the purpose of ascertaining the nature of the subsoil or the presence of minerals therein : section 103 (9)) it in connection with the preparation, approval, making or amendment of a development plan.[54] This person must, if so required, produce evidence of his authority before entering, and must not demand admission as of right to any land which is occupied unless twenty-four hours' notice of the intended entry has been given to the occupier.[55] As the rights of occupiers are constantly being whittled down in the interests of the State, it is hoped that occupiers will always exercise this right and will allow no one to enter without production of evidence of proper authority and proper notice having been given. There is a danger of our becoming too obedient; of our thinking that because a person knocks at the door and says he is from ' the Ministry ' that he can do as he pleases. This right has been given by the Act to occupiers; let them use it. Non-user might be used in the future in other connections as a reason for not giving the right. Any person who wilfully[56] obstructs a person exercising the powers of entry and surveying is liable on summary conviction to a fine not exceeding £20. Where the exercise of the power of entry or of making the survey causes damage to the land, compensation for such damage may be recovered by any person interested in the

[51] *Ibid.*, at p. 399.
[52] *Ibid.*
[53] S. 11 (3).
[54] S. 103 (1) (*a*).
[55] S. 103 (4).
[56] *I.e.*, deliberately and intentionally: *R.* v. *Senior*, [1899] 1 Q.B. 283.

land from the Minister, Central Land Board or authority on whose behalf the entry was effected.[57]

To ensure that the new planning system is not static, a local planning authority must, at least once in every five years after the date on which the development plan for their area received ministerial approval, carry out a fresh survey of their area and submit a report of the survey to the Minister, together with proposals they think necessary for any alterations or additions to the plan.[58] A development plan may be prepared and approved for only part of their area before a development plan for the whole area is approved,[59] in which case the period of five years runs from the date on which the Minister approved the development plan for the whole area.[60] A local planning authority can at any time, and must if so directed by the Minister, submit to the Minister proposals for such alterations or additions to their development plan as they think to be expedient, or are required by the ministerial directions,[61] and the Minister has power, where proposals for alterations or additions to a development plan are submitted to him, to amend the plan to such extent as he considers expedient having regard to such proposals and to any other material considerations.[62] The Minister's power to give directions can be a safeguard from the point of view of the landowner who thinks the development plan should be amended and whose request has been turned down by the local planning authority. The landowner would then be entitled to press his case with the Minister direct, and might succeed in persuading the Minister that he should direct the local planning authority to submit a proposal to him covering the landowner's point. Further, there is the 'default' power of the Minister. If no plan, report or proposals, or no satisfactory plan or proposals are submitted to the Minister within the specified time, or if the Minister is satisfied, after holding a local inquiry, that the local planning authority are not taking the steps necessary to enable them to submit such a plan, report or proposals within that period, the Minister may make or amend the development plan, expediency being his guiding principle.[63] Any expenses the Minister incurs in doing this work will be paid in the first instance out of moneys provided by Parliament, but will be recoverable on demand from the local planning authority.[64] This provision is similar to that often inserted in leases giving the landlord power, when the lessee defaults in his repairing obligations, to do the necessary work and

[57] S. 103 (7).
[58] S. 6 (1).
[59] S. 5 (5).
[60] S. 6 (4).
[61] S. 6 (2).
[62] S. 6 (3).
[63] S. 7 (1).
[64] S. 7 (4).

recover the amount from the lessee. But the landlord cannot dip into moneys provided by Parliament.

The provisions of sections 6 and 7 certainly eliminate the rigidity of the scheme under the 1932 Act, but it is possible that they have introduced too much flexibility. The change from rigidity to flexibility may be too dynamic. The landowner is entitled to some certainty as regards the position of his land from the planning point of view, but will he get it if the power to amend the development plan is exercised to the full? It would seem to be imperative, if the scales are to be held evenly between the landowner and the community, that great care should be taken over the preparation of the first development plan. If that is done then the necessity for amendment should not often arise.

Another protection of the landowner is to be found in section 9. If his land has been designated by the development plan as subject to compulsory acquisition and at the end of twelve years from the date when the plan came into operation his land has not been so acquired, he is entitled to serve on the local planning authority a notice requiring his interest in the land to be so acquired,[65] and if within six months after serving his notice neither a notice to treat nor an offer to acquire his land at a price equal to the compensation which would be payable if it were acquired compulsorily has been served or made, then the development plan will operate as if his land had not been designated as subject to compulsory acquisition.[66] The present writer has called this a ' protection ' because it prevents a perpetual sterilisation of the landowner's interests. His interests may, where the land has been so designated, be sterilised for twelve years, which is no light matter, but the Minister may exercise his power to amend the plan by releasing the land from compulsory acquisition when considering the quinquennial survey.[67] On the other hand, the Minister may amend the development plan so that land not previously designated as subject to compulsory acquisition shall be so designated.[68]

CONTROL OF DEVELOPMENT

It is in connection with the user of his land that the landowner is made to realise how greatly his status as a landowner has changed. At common law he had the right to use his land in whatever way he pleased, subject only to the restraints covered by the maxim *sic utere tuo ut alienum non lædas*. That concept of the position of the landowner has for many years now been undergoing changes, and the landowner has been encircled with so many statutory restrictions that his position has become an unenviable one. It might even be said that it is almost a punishment to be a

[65] S. 9 (1).
[66] S. 9 (2).
[67] S. 9 (2).
[68] *Ibid.*

landowner. The pendulum has possibly swung too far in the interests of the community. It is all very well to say that the object of town and country planning is to secure that all the land in the country is put to the use which is best from the point of view of the community, and that planning operates to achieve this by controlling changes in the use of land, by securing that development of the right kind takes place, and by eliminating wrong uses.[69] Planning means State control, and whilst the State is omnipotent it is not omniscient, although it pretends to be. But it cannot be denied that, economically, it is essential that all the land in the country shall be put to the best use, and this inevitably means that the private landowner must give way to the community. But need he have done so to the extent that legislation has forced him to? Time alone can answer that question. If genuine co-operation is desired by the State, *i.e.* the Government for the time being, then it must be prepared to compromise with the other side and must also be willing to learn. It may be that landowners in the past were intolerant and obstinate—some still are—but that would not entitle the State to act likewise. If genuine co-operation between all interested parties is in fact obtained, then planning will be a boon and a blessing : if not, then it may well prove to be the start of the march back to feudalism. A doubt exists, but the State must be given the benefit of the doubt, and one's initial approach to town and country planning should be in the spirit that planning is a constructive process, even though it necessarily involves placing restrictions in the common interest on the way in which owners may use their land.

Part III of the Act is of vital importance to the landowner, as its main theme is that the landowner must get permission to develop his land after July 1, 1948.[70] That is the general principle, to which there are important exceptions. But what is 'development'? The Act expressly provides that, except where the context otherwise requires, the expression 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.[71] But for a proper comprehension of the meaning of 'development' recourse must be had to the interpretation section[72] of the Act, as certain parts of the definition have been given meanings of their own. Thus, 'building operations' includes rebuilding operations, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder, and 'mining operations' includes the formation or laying out of means of access

[69] Explanatory memorandum on the Town and Country Planning Bill, 1947, p. 1 (Cmd. 7006 of 1947).
[70] S. 12 (1).
[71] S. 12 (2).
[72] S. 119.

to highways, 'means of access' including any means of access, whether private or public, for vehicles or for foot passengers, and also including a street.[73] 'Use', in relation to land, does not include the use of land by the carrying out of any building or other operation thereon; 'building' includes any structure or erection and any part of a building as so defined, but does not include plant or machinery comprised in a building; 'erection' in relation to buildings includes extensions, alteration and re-erection; and 'land' means any corporeal hereditament, including a building as defined by section 119, and in relation to the acquisition of land under Part IV of the Act includes any interest or right in or over land.[74] Faced with this definition, the landowner may well inquire to what use he can put his land without permission, and we will now tackle such an inquiry.

First, the proviso to section 12 (2) enumerates six operations or uses of land which are not to be deemed development of land for the purposes of the Act. The phrase 'operations or use' is a useful reminder that the statutory definition of 'development' really consists of two branches, the first covering operations (*e.g.*, building or mining), and the second covering any material change in the use of land. The said proviso holds the scales evenly between the two branches, as it excludes three classes of operations and three uses from the scope of the Act. Thus, the carrying out of works for the maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external appearance of the building, is not 'development'.[75] Again, the carrying out by a local highway authority of any works required for the maintenance or improvement of a road, being works carried out on land within the boundaries of the road, does not involve development,[76] neither does the carrying out by any local authority or statutory undertakers of any works for the purpose of inspecting, repairing or renewing any sewers, mains, pipes, cables or other apparatus, including the breaking open of any street or other land for that purpose.[77] These are the three classes of operations mentioned in the proviso to section 12 (2).

As regards the three uses of land which do not involve development within the meaning of the Act and which consequently do not require permission, the first of them is of importance to the ordinary landowner, as it permits the use, without its involving development and therefore without permission, of any buildings or other land within the curtilage of a dwelling-house for any purpose

[73] S. 119 (1).
[74] *Ibid.*, Part IV—ss. 37–46—of the Act deals with the acquisition and disposal of land for planning purposes.
[75] S. 12 (2) (*a*).
[76] S. 12 (2) (*b*).
[77] S. 12 (2) (*c*).

incidental to the enjoyment of the dwelling-house as such.[78] ' Dwelling-house ' is not defined in the Act, and so when deciding whether or not premises are a dwelling-house it seems that the usual test should be applied, *viz.* What is the real, main and substantial purpose of the premises ?[79] This, of course, is a question of fact. But as Mr. Justice Evershed (as he then was) has said ' . . . to sleep on particular premises at night, or to have one's meals upon them by day, or both, ought not *ipso facto* to have the effect in law of making those premises a dwelling-house . . . '.[80] Difficulties may arise as to the meaning of the expression ' curtilage of a dwelling-house '. As the Lord Chancellor said during the passage of the Bill, the word ' curtilage ' is ' . . . one of those cases in which, broadly speaking, we all know what we mean, but none of us can quite define it. . . . We must leave it to the judges to provide us with a set of rules as to what is and what is not a " curtilage " '.[81] Also, as already pointed out, ' use ', in relation to land, does not include the use of land by the carrying out of any building or other operations thereon,[82] so that all matters and things falling within the definition of ' building operations '—given above —or covered by ' other operations ' are development and require permission.

The second of these three uses is the use of any land for the purposes of agriculture or forestry (including afforestation), and the use for any of those purposes of any building occupied together with land so used.[83] It is expressly provided that ' agriculture ' includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes.[84]

The last of these three uses not involving development is of great importance to the ordinary landowner, as in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Minister under section 12, the use thereof for any other purpose of the same class does not involve development of the land.[85] The Town and Country Planning (Use Classes) Order, 1948,[86] has been made by the Minister in exercise

[78] S. 12 (2) (*d*).
[79] *Greig* v. *Francis & Campion, Ltd.* (1922), 38 T.L.R. 519.
[80] *Macmillan & Co., Ltd.* v. *Rees*, [1946] 1 All E.R. 675, at p. 677.
[81] 149 House of Lords Official Report 556.
[82] S. 119 (1).
[83] S. 12 (2) (*e*).
[84] S. 119 (1), which also provides that ' agricultural ' shall be construed accordingly.
[85] S. 12 (2) (*f*).
[86] Statutory Instruments, 1948, No. 954. All landowners are advised to read the Order itself, and the Minister's Explanatory Memorandum and Circular No. 42 issued in connection with the Order.

of his powers under section 12. The Schedule to the Order enumerates twenty-two use classes, and Article 3 of the Order provides that where a building or other land is used for a purpose of any class specified in the said Schedule, the use of such building or other land for any other purpose of the same class shall not be deemed to involve development. Some of the use classes are not likely to concern the ordinary landowner, *e.g. Classes V–IX*, both inclusive, being Special Industrial Groups A, B, C, D, and E and covering (inter alia) such processes as chromium plating, production of calcium carbide, lampblack or zinc oxide; such purposes as the production or employment of cyanogen or its compounds; the production of B-naphthol or sulphonated organic compounds; and the carrying on of such industries, businesses or trades as breeder of maggots from putrescible animal matter, dealer in rags and bones, and gut scraper or gut cleaner; *Class X*, wholesale warehouses, *i.e.*, buildings where business principally of a wholesale nature is transacted and goods are stored or displayed, but only incidentally to the transaction of the business [87]; *Class XI*, repositories, *i.e.*, buildings (excluding any land occupied therewith) where storage is the principal use and where no business is transacted other than incidentally to such storage [88]; *Class XII*, buildings for public worship or religious instruction; *Class XIII*, residential or boarding schools and orphanages; *Class XV*, convalescent homes, nursing homes, sanatoria, hospitals; *Class XIX*, theatres, cinemas or music halls; *Class XX*, art galleries (other than for business purposes), museums, and public libraries and reading rooms. But some of the remaining classes are of direct importance to the ordinary landowner. Thus—

Class I, which permits the use as a shop for any purpose except as (i) a fried fish shop; (ii) a tripe shop; (iii) a shop for the sale of pet animals or birds; and (iv) a cats-meat shop. 'Shop' is defined as meaning a building used for the carrying on of any retail trade or retail business wherein the primary purpose is the selling of goods (excluding refreshments other than light refreshments) by retail, and includes a hairdresser, undertaker, ticket agency or receiving office for goods to be washed, cleaned or repaired, or for other purposes appropriate to a shopping area, but does not include a building used as an amusement arcade, pin-table saloon, funfair, garage, petrol filling station, hotel, or premises licensed for the sale of intoxicating liquors for consumption on the premises.[89]

Class II, use as an office for any purpose. 'Office' includes a bank.[90]

[87] Art. 2 (2).
[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*

Classes III and IV, use as a light industrial building for any purpose, or as a general industrial building for any purpose.[91]

Class XIV, use as a boarding- or guest-house, a residential club, a hostel or a hotel providing sleeping accommodation.

The Order provides that a use which is ordinarily incidental to and included in any use specified in the Schedule to the Order is not excluded from that use as an incident thereto merely by reason of its specification in the Schedule as a separate use.[92] In other words, ancillary uses are to be regarded as included in main uses. For example, part of a shop may be used as an office. The Order also provides that where a group of contiguous or adjacent industrial buildings, which form a single undertaking, includes buildings used for purposes falling into two or more of the various industrial classes, the owner can interchange the uses between the said buildings. Also that he can alter the proportion of accommodation allotted to purposes in different classes, provided that the proportion allotted to purposes falling into the classes of general industrial buildings or special industrial buildings is not substantially increased thereby.[93]

It might be as well to mention here that the Town and Country Planning (Use Classes) Order, 1948, can be amended or revoked by the Minister by a subsequent Order,[94] and landowners and their advisers must, when considering the question of development, make certain that they are working on the current Order.

Secondly, by virtue of section 12 (5), an owner has not to obtain permission—

(a) for the resumption of the normal use of his land where, on July 1, 1948, his land was being used temporarily for a purpose other than the purpose for which it is normally used. But when determining the purposes for which the land was normally used no account will be taken of any use of the land begun in contravention of previous planning control within the meaning of section 75 of the Act.[95] Section 75 (9) enacts that uses of land shall be deemed to have begun in contravention of previous planning control (i) where at the material time the land was subject to a resolution to prepare a planning scheme, if carried out or begun otherwise than in accordance with permission granted in that behalf by or under the interim development order; (ii) where at the material time the land was subject to a planning scheme, if carried out or begun otherwise than in conformity with the provisions of the scheme or of

[91] The expressions ' light industrial building ', ' general industrial building ', and ' special industrial building ' are defined in Article 2 (2).
[92] Art. 3 (3).
[93] Art. 3 (2).
[94] S. 111 (4). This Order must not be confused with the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948—Statutory Instruments, 1948, No. 955, which cannot now be amended or revoked by the Minister.
[95] Proviso (i) to s. 12 (5).

permission granted thereunder. Where permission for any use was granted subject to conditions (in whatever form) restricting the period during which the use could be continued on the land, and that period expired before July 1, 1948, the provisions of section 75 apply as if the use had begun in contravention of previous planning control. An illustration of the kind of case which falls under head (a) is where, on July 1, 1948, a field or fields were being used for a few days for the purposes of an agricultural show. When the show is ended, the landowner is entitled to resume, without permission, the normal user of his field or fields, provided such user did not contravene previous planning control.

(b) where, on July 1, 1948, his land is normally used for one purpose and is also used on occasions, whether at regular intervals or not, for any other purpose, for the use of his land for that other purpose on similar occasions after July 1, 1948. Thus, taking the illustration used for head (a), if the land is, *e.g.*, used at some time every year for the purposes of an agricultural show, the owner can go on doing this without having to get permission.

(c) where, on July 1, 1948, his land was unoccupied, for the purposes for which his land was last used. But this provision does not apply to land which was unoccupied on January 7, 1937, and has not been occupied since that date.[96] A similar qualification as to the last user not contravening previous planning control applies to this case.[97]

Thirdly, as the definition of 'development' stipulates 'the making of any material change in the use of any buildings or other land', it follows that a landowner can, without permission, change the use of his property provided it is not a material change. As 'material change' is not defined by the Act, each case will have to be considered on its own merits from a planning point of view. The expression 'material change' is new, as the 1932 Act used the expression 'change' of use, and the new expression appears to indicate that there must now be some real substance in the change of use before it will amount to 'development'.

It should perhaps be pointed out that the matters first, secondly and thirdly described are things which a landowner is entitled to do as of right, as they do not involve development.

The Act itself, 'for the avoidance of doubt', declares—

(a) that the use as two or more separate dwelling-houses of any building previously used as a single dwelling-house involves a material change in the use of the building and of each part thereof which is so used.[98] Consequently, permission to carry out the change is necessary, but no development charge will be payable.[99] It should be particularly noted that it is the use as two or more

[96] Para. (ii) of the proviso to s. 12 (5).
[97] Para. (i) of the proviso to s. 12 (5).
[98] S. 12 (3) (*a*).
[99] S. 69 (2) (*a*), and para. 2 of Part I of the Third Schedule to the Act.

separate dwelling-houses that involves development, and guidance as to what is or is not a ' separate dwelling ' may be obtained from such cases under the Rent Restrictions Acts as *Neale* v. *Del Soto* [1]; *Sharpe* v. *Nicholls* [2]; *Cole* v. *Harris* [3]; *Kenyon* v. *Walker* [4]; *Banks* v. *Cope-Brown* [5]; *Llewellyn* v. *Hinson* [6]; and *Curl* v. *Angelo and Another.*[7] In view of the acute shortage of dwellings, it may be assumed that local planning authorities will be lenient in giving permission for the conversion of single dwelling-houses into two or more separate dwelling-houses. It may be irksome for a landowner to have to get permission to change the user of his premises in this way, but it must be remembered that the control should result in proper conversion, which has not always been the case in the past.

(b) that the deposit of refuse or waste materials on land involves a material change in the use thereof, notwithstanding that the land is comprised in a site already used for that purpose, if the superficial area or the height of the deposit is thereby extended.[8] Such deposit is ' development ' as statutorily defined,[9] and consequently permission is required for such deposit, except that no permission is wanted for the deposit of refuse or waste materials on a site already used for that purpose if the height of the deposit does not exceed the level of the land adjoining the site, and the superficial area of the deposit is not thereby extended.[10] In other words, permission is not required for the filling-in of holes.

(c) that the use for the display of advertisements of any external part of a building which is not normally used for that purpose shall be treated as involving a material change in the use of that part of the building,[11] but this is without prejudice to any regulations made under the provisions of the Act relating to the control of advertisements.[12]

The Town and Country Planning (General Development) Order, 1948 [13]

We now come to this Order, hereinafter referred to as the ' G.D.O.', which the Minister has made pursuant to his powers under section 13. This Order enables the ordinary landowner,[14] subject to the

[1] [1945] 1 All E.R. 191.
[2] [1945] 2 All E.R. 55.
[3] [1945] 2 All E.R. 146.
[4] [1946] 2 All E.R. 595.
[5] [1948] 2 All E.R. 76.
[6] [1948] 2 All E.R. 95.
[7] [1948] 2 All E.R. 189.
[8] S. 12 (3) (*b*).
[9] Ss. 12 and 119.
[10] Proviso to s. 12 (3) (*b*).
[11] S. 12 (4).
[12] *Ibid.* The Minister, pursuant to his powers under ss. 31, 32 and 111, has made the Town and Country Planning (Control of Advertisements) Regulations, 1948—Statutory Instruments, 1948, No. 1613.
[13] Statutory Instruments, 1948, No. 958.
[14] The Order also deals with development by Local Authorities; Local Highway or Improvement Authorities; Drainage Authorities; Sewerage Authorities;

provisions of the Order, to carry out development of any class specified in the First Schedule to the Order, without the permission of the local planning authority or the Minister.[15] Permission for such development is granted by the Order itself, and such permitted development comprises—

Class I, the erection or construction and the maintenance, improvement or other alteration, within the curtilage of any dwelling-house, of any building or work (other than a dwelling or a garage) ancillary to, but not forming part of, or permanently attached to, a dwelling-house, and required for any purpose incidental to the enjoyment of the dwelling-house as such; and shelters for keeping poultry, livestock, bees, pet animals or birds for the domestic needs or personal enjoyment of the occupants of the dwelling-house; but the height of any such building or shelter must not exceed ten feet, and its capacity 1,000 cubic feet.

Class II, the erection or construction of gates, fences, walls, or other means of enclosure, not exceeding seven feet in height and not affording access to or abutting on a highway, and their maintenance and repair.

Class III permits the change of use from use as a general industrial building [16] to a light industrial building,[16] and from use as a fried fish shop, a tripe shop, a shop for the sale of pet animals or birds, or a cats-meat shop, to use as any type of shop.[17] It will be gathered from what has already been said that to change the use as a shop *to* a fried fish shop, a tripe shop, a shop for the sale of pet animals or birds, or a cats-meat shop is ' development ' and requires express planning permission, and that the converse case, *viz.*, to change *from* a fried fish shop, etc., to any other kind of shop does *not* require express planning permission, as the G.D.O. grants permission for this.

Classes IV and V contain the new provisions regulating camping, and here the Minister has gone to great trouble to meet the different points of view put before him. As the Minister says,[18] not all camping is development. To put one caravan for one night in a 100-acre wood does not involve a ' building, engineering, mining or other operation in, on, over or under land ', and it is very doubtful whether it involves a ' material change ' in the use of the land. But to put 100 caravans in a single field and to use them for, say, six months, might amount to a ' material change ' in the use of the field. Between these two extremes there is a wide range of

Educational Authorities; Statutory Undertakers; Mineral Undertakers; and the National Coal Board; and with development previously sanctioned by a Government Department, but these aspects are outside the scope of this article.

15 Art. 3.

16 As defined by the Town and Country Planning (Use Classes) Order, 1948, *vide* the said First Schedule. See also footnote [91] above.

17 The definition of ' shop ' in the G.D.O. is exactly the same as in the Use Classes Order, as to which see above.

18 Circular No. 47.

possibilities. The planning authorities felt they should be in a position to control camps used for long periods by a large number of people, or the use of caravans which, though mobile, are never moved and are used as permanent or semi-permanent dwellings, while the camping interests held that unless campers were given a specific permission by the G.D.O., landowners would be reluctant to allow them on their land for fear of enforcement action by the planning authorities. The Minister has, it is submitted, adopted a common sense attitude to the problem. He has divided campers into two categories: (1) those who belong to recreational organisations which hold certificates of exemption granted by the Minister of Health under section 269 of the Public Health Act, 1936, and which include camping among their activities (*e.g.*, The Boy Scouts' Association), and (2) those who do not belong to any such organisation. The first category are covered by *Class V*, which permits them, without limit of time, to use land unoccupied by buildings and not within the curtilage of a dwelling-house for the purposes of recreation or instruction by members of the organisation, and for those purposes to erect or place tents or caravans on the land. The second category are legislated for by *Class IV*. In so far as any camping they undertake involves development at all, they are permitted [19] to use land unoccupied by buildings for any purpose for a period or periods not exceeding twenty-eight days altogether in any calendar year, and to erect or place moveable structures on the land for the purposes of that use.[20] Should their camping not involve development, they require no planning permission. The difference between the two categories of campers is that the organisations referred to always have strict codes of rules for their members, and this is undoubtedly a safeguard from the point of view of the planning authorities.

Class VI permits the erection or construction of separate buildings [21] for agricultural purposes provided they are permanently affixed to the ground; do not have a superficial area of more than 300 square feet and a maximum height of thirteen feet; are not more than 150 feet from the group of principal farm buildings; and are not for human habitation. It also permits (inter alia) buildings for such purposes not permanently affixed to the ground (*e.g.*, shelters for livestock); silos not exceeding fourteen feet in height; wells and reservoirs, or water tanks not exceeding fourteen feet in height nor 20,000 gallons in capacity; the formation, alteration and maintenance of private ways [22] on such land; and, a homely touch,

[19] Not, of course, without the consent of the landowner.

[20] The G.D.O. does not give exemption from development charge, but 'the use of any land for camping purposes by the placing thereon of any caravan or tent' is exempted by the Town and Country Planning (Development Charge Exemption) Regulations, 1948, Statutory Instruments, 1948, No. 1188—Class 9.

[21] 'Building' does not include plant or machinery but includes any other structure or erection and any part of a building as so defined: Art. 2 (1).

[22] 'Private way' means a road or footpath which is not a highway repairable by the inhabitants at large: Art. 2 (1).

the erection or construction and the maintenance, improvement or other alteration of roadside stands for milk churns [23]. Could the direct attention of farmers be called to the fact that improvement of roadside stands for milk churns is permitted development, as it is not an uncommon sight to see milk churns put by the roadside without adequate protection from the sun, which is not a good thing from the consumer's point of view, particularly as milk planning does not appear to involve expeditious distribution.

Class VII permits the erection, etc., of forestry buildings (of the same size as permitted for agricultural buildings) and works, and *Class VIII* enumerates matters of permitted development for industrial purposes.

Class IX permits the carrying out of works required for the maintenance or improvement of an unadopted street [24] or private way, being works carried out on land within the boundaries of the street or way, and *Class X*, the carrying out of any works for the purpose of inspecting, repairing or renewing sewers, mains, pipes, cables or other apparatus, including the breaking open of any land for that purpose. As for the rebuilding, restoration or replacement of war-damaged buildings, works or plant, *Class XI* permits this to be done, so long as the cubic content immediately before the occurrence of the war damage is not increased, and the work does not involve a material alteration from the external appearance immediately before such occurrence.

These eleven Classes are those that affect the ordinary landowner, who may do any of the matters and things covered by them without the permission of the local planning authority or the Minister, except that he is not at liberty to do anything (1) which provides or alters the means of access to any road used by vehicular traffic except (a) for pedestrians to an unclassified road,[25] or (b) the alteration for agricultural purposes of a means of access used for those purposes to a road [25] which is neither a trunk road [25] nor a road classified in Class I or Class II under the Ministry of Transport Act, 1919; or (2) which obstructs the view of persons using any road used by vehicular traffic at or near any bend, corner, junction, or intersection so as to be likely to cause danger to such persons.[26] If the Minister or the local planning authority is satisfied that it is expedient that development of any of the classes specified in the First Schedule to the Order should not be undertaken in any particular area, or that any particular development of any of those classes should not be undertaken, unless permission is granted on an application in that behalf, appropriate directions may be given

[23] Except where they would abut on any trunk or classified road.
[24] 'Unadopted street' means a street as defined by the Public Health Acts and not being a highway repairable by the inhabitants at large.
[25] By Art. 2 (1), 'classified road', 'road', and 'trunk road' have the meanings respectively assigned to these expressions by the Trunk Road Acts, 1936 and 1946.
[26] Proviso to Art. 3 (1).

restricting such permitted development.[27] Notice of any such direction has to be published in at least one newspaper circulating in the locality affected, and in the *London Gazette*, and it must contain a concise statement of the effect of the direction, and name the place where a copy of it can be seen at all reasonable hours,[28] and notice of the direction must be served on the owner and occupier of the land affected.[29] Even so, any person, *e.g.*, a purchaser, proposing to have dealings with any land should inquire of the local planning authority if it has given any such direction, or whether the Minister has.

The G.D.O. appears to justify the Minister's statement that the Order ' attempts to strike a balance between a necessary degree of planning control and a reasonable freedom for developers [landowners] to carry out minor day-to-day operations '.[30] Also, his attitude that it ' may be that not quite the right balance has been achieved and it is the Minister's wish that the attention of his officers should be drawn to any case in which the Order does not work well in practice, so that revision of the Order can be considered ' [31] is most commendable, and indicates how useful a legal training is to a Minister of the Crown.

Having dealt with (a) those matters and things that a landowner can still do as of right; and (b) those in respect of which planning permission is granted by the G.D.O.; we will now consider the position where what the landowner wishes to do is development, as statutorily defined, and is not covered by the G.D.O. or by a special Order applicable to the owner's land.[32] Here, application for planning permission will have to be made.

Applications for Planning Permission

Landowners are directed that applications for permission for development made to a local planning authority must be in accordance with any Regulations under section 102 of the Act for the time being in force.[33] The existing Regulations are the Town and Country Planning (Making of Applications) Regulations, 1948,[34] Article 2 of which provides that an application for planning permission must be made on a form issued by the local planning authority and obtainable from that authority or the Council with whom the application is to be lodged, and must include such particulars and be accompanied by such plans and drawings, together with such additional number of copies (not exceeding three) of the form and

[27] Art. 4 (1).
[28] Art. 4 (3).
[29] Art. 4 (4).
[30] Circular No. 47, para. 2.
[31] *Ibid.*
[32] S. 13 (2) confers power to make a special Order applicable only to such land as may be specified in the Order.
[33] G.D.O., art. 5 (1).
[34] Statutory Instruments, 1948, No. 711.

plans and drawings, as may be required by the directions printed on the form, but it is not to be 'necessary to furnish plans and drawings other than a plan sufficient to identify the land to which the application relates, in any case where the proposed development is, for the purposes of the local planning authority, sufficiently described by the particulars together with that plan '.[35] The Minister has furnished local authorities with a model form of application for planning permission,[36] intended as a guide to them and which they can either adopt or vary to suit local circumstances, and on page 5 of Circular No. 45 it is stated that the provision put in quotation marks means that in certain cases only one plan together with not more than three copies will be required by the local planning authority instead of the set of plans and drawings detailed in Circular No. 45. It is hoped that, for the sake of the poor harassed landowner, the 'certain cases' will be numerous, as the set of plans and drawings detailed in Circular No. 45 comprises (i) a site plan; (ii) a layout plan; and (iii) block and building plans. These plans must be of the scale, and include all the detail, indicated on pages 5–7 of Circular No. 45. Local planning authorities have been requested not to make any major changes to the requirements for plans without first consulting the Central Land Board, as the same plans will be used for the application for planning permission and for the application for a determination of development charge to the Central Land Board. It is gratifying to learn that at least one Council has taken some pains to keep the number of copies of deposited plans down to a minimum. The Middlesex County Council 'asks only for one copy of plans, although it would have been a much greater convenience to have received two. The advantage to the public was considered to outweigh the advantage to the authority. The number of copies thus needed in normal cases is three—one for the borough or district council for the purpose of building byelaws, one for the county council for town planning, and one for the Central Land Board to assess the development charge '.[37] Even if all local planning authorities prove to be imbued with the same spirit as the Middlesex County Council it is not going to be a cheap matter for a landowner to apply for planning permission, as it will in practice be necessary for him to consult planning experts of one kind or another, and they do not work for nothing.

The particulars required by the model form of application are of a usual character, and the notes for guidance in completing the application tell the applicant (inter alia) that if his application relates to the erection of an industrial building which will have an aggregate floor space exceeding 5,000 square feet he must attach a

[35] *Ibid.*, art. 2 (1).
[36] See the Appendix to Circular No. 45.
[37] See the letter from the Chairman, County Planning Committee, Middlesex County Council, and the Middlesex County Planning Officer in *The Times* newspaper dated August 3, 1948.

certificate issued by the Board of Trade certifying that the proposed development can be carried out consistently with the proper distribution of industry,[38] and that a kitchen should be regarded as a habitable room if it is intended to be used as a living room as well as a kitchen, but not otherwise.

Where the land concerned is (a) in the administrative county of London, the application must be lodged with the Common Council of the City of London or the London County Council (as the case may require); (b) not in that administrative county, with the county Borough Council or the county District Council for the area in which the land is situated. The authority has, where necessary, to transmit it to the local planning authority.[39] On receipt of the application the local planning authority must send to the applicant an acknowledgment thereof. They must specify in the acknowledgment the date by which he should receive their decision and inform him that if he is not given notice of their decision by that date he is entitled, unless the application has already been referred by them to the Minister, to appeal to the Minister in accordance with section 16 of the Act by notice served within one month from that date.[40] The period given to the local planning authority is, in ordinary cases, two months, or such extended period as may be agreed in writing between the applicant and the local planning authority.[41] Two months was the period in connection with applications for interim development permissions under the repealed legislation, and it is disappointing that the Minister has not reduced the period. National conditions are such that we cannot afford the luxury of taking at least two months to deal with applications for planning permission, and surely the ministerial slogan ' Go to it ! ' is applicable to planners? If the local planning authority decide to grant permission subject to conditions or to refuse permission, they must state their reasons in writing and send with their decision a notification to the applicant of his right to appeal to the Minister in accordance with section 16 within one month of the receipt of the local planning authority's decision.[42]

The Minister is entitled to give directions restricting the grant of permission by a local planning authority during such period as may be specified in the directions, in respect of any development or class of development,[43] and the local planning authority to whom such a direction is given must deal with applications for planning permission so as to give effect to the direction.[44] An important power is that which enables the Minister to grant permission for development

[38] See s. 14 (4).
[39] The Town and Country Planning (Making of Applications) Regulations, 1948, art. 2 (2).
[40] G.D.O., art. 5 (2), and Part I of the Second Schedule to the Order.
[41] *Ibid.*, art. 5 (3) (*c*).
[42] *Ibid.*, art 5 (4), and Part II of the Second Schedule to the Order.
[43] S. 14 (3) (*a*), and G.D.O., art. 6 (1).
[44] G.D.O., art. 6 (2).

which does not accord with the development plan.[45] Article 9 of the G.D.O. enumerates the authorities or persons the local planning authority must consult before granting permission for development.[46]

The Minister is also entitled to give directions to all or any local planning authority requiring that any application for planning permission shall be referred to him instead of being dealt with by the local planning authority,[47] and when the Minister does this (a) he must, if either the applicant or the local planning authority so desire, give each of them an opportunity of appearing before and being heard by a person appointed by the Minister for the purpose[48]; (b) the local planning authority must serve on the applicant notice of the terms of the Minister's direction, and of any reasons given by the Minister for issuing the direction, and that the application has been referred to the Minister.[49] Whilst the Minister must give the parties a hearing, there is no requirement that such hearing must be in the nature of a public local inquiry. It could take the form of, *e.g.*, a private inquiry at the Ministry. Moreover, the evidence will not as a rule be given on oath, not that that will inflict any hardship on the appellant, having regard to the present day value of the oath; and (c) the Minister's decision will be final.[50] Of course, if either party contends that the Minister has acted without, or in excess of his, jurisdiction, that party can ask for *certiorari* to bring up the decision of the Minister to be quashed,[51] and if the contention is upheld the Minister's decision will not be final—it will be quashed. But where the Minister has jurisdiction, he will not be deemed to exceed or abuse his jurisdiction merely because he incidentally misconstrues the statute, or admits illegal evidence, or rejects legal evidence, or misdirects himself as to the weight of the evidence.[52]

Every local planning authority have to keep either at their office or at a convenient place a register of all land within their area, which register must contain particulars of any application for permission for development made to them; of any direction given under the Act or the G.D.O. in respect of the application; of the decision (if any) of the local planning authority in respect of the

[45] S. 14 (3) (*b*), and G.D.O., art. 8.
[46] See also s. 14 (3) (*c*).
[47] S. 15 (1).
[48] S. 15 (2) and G.D.O., art. 10. The Act does not lay down any time limit within which either party should give notice to the Minister of their desire to take advantage of this provision of appearing and being heard. The Minister has intimated (see Circular No. 47, para. 15 (*d*)) that in practice he will always be prepared to allow a reasonable time according to the circumstances of the case, but suggests that in normal cases notice of desire for a hearing should be given to him within one month.
[49] G.D.O., art. 10.
[50] S. 15 (3).
[51] *R.* v. *Minister of Health, ex p. Committee of Visitors of Glamorgan County Mental Hospital*, [1938] 4 All E.R. 32.
[52] Halsbury's *Laws of England*, Hailsham edn., Vol. 9, p. 888, para. 1493.

application and the date of such decision; and the date and effect of any decision of the Minister in respect of the application, whether on appeal or on a reference under section 15. This register, which must include an index in the form of a map (unless the Minister approves some other form) to enable a person to trace any entry in the register, must be available for inspection by the public at all reasonable hours.[53] No provision has been made for the issue of official certificates of search, as is done in connection with the Register of Local Land Charges kept under the Land Charges Act, 1925, as amended by the Law of Property (Amendment) Act, 1926, and which official certificates included matters falling within the Town and Country Planning Act, 1944, so it will be necessary to make personal inspections of the register. The Minister has pointed out the likelihood of a public demand for extracts from the register to be sent by post, and has expressed the hope that local planning authorities will be able to make arrangements for this purpose, although there is no statutory obligation upon them to do so.[54] It would seem that any person can inspect the register, whether or not he is interested as, say, a prospective purchaser or mortgagee of a particular property, and whether or not he has the landowner's consent. This is another diminution of the landowner's right to keep to himself and persons authorised by him information relating to his land. It may be that the register kept under this Act could not be given the same private character as the register kept under the Land Registration Act, 1925.

The power to grant permission to develop land includes power to grant permission for the retention on the land of any buildings or works constructed or carried out before the date of the application,[55] and the permission may be granted so as to take effect from the date on which the buildings or works were constructed or carried out,[56] *i.e.*, can be granted having retrospective effect. An important power from the landowner's point of view is that where permission is granted for the erection of a building, the grant may specify the purposes for which the building may be used. If no purpose is specified, the permission has to be construed as including permission to use the building for the purpose for which it is designed.[57] Also, unless the permission otherwise provides, the grant of permission enures for the benefit of the land and of all persons for the time being interested therein, but without prejudice to the provisions of the Act relating to revocation and modification of the grant of permission.[58] If permission to develop has been granted, the local planning authority may make an order revoking or modifying their permission to such extent as appears to them to be expedient,

[53] S. 14 (5), and G.D.O., art. 12.
[54] Circular No. 47, para. 13.
[55] S. 18 (1).
[56] S. 18 (2).
[57] S. 18 (3).
[58] S. 18 (4).

having regard to the devlopment plan and to any other material considerations.[59] Safeguards from the landowner's point of view are that such an order of the local planning authority will not take effect unless it is confirmed by the Minister[60]; that the owner, occupier, and any other person who in the opinion of the local planning authority will be affected by the order, must be given notice by the local planning authority, and any person on whom such a notice is served must, before the Minister confirms the order, be afforded an opportunity of appearing before and being heard by a person appointed by the Minister for that purpose[61]; and that the revocation or modification is not to affect what may have previously been done under the permission.[62] This power to revoke or modify can only be exercised before the building or other operations have been completed or the permitted change of use has taken place.[63] Section 22 entitles the appropriate person to claim compensation in certain circumstances where, as a result of the revocation or modification, he sustains loss or damage directly attributable thereto, or where he has incurred expenditure in carrying out work which is rendered abortive by the revocation or modification.

It is clear that in practice a landowner will not always be certain whether what he proposes to do with his land will involve development or whether planning permission is necessary. One can easily see that nice points are bound to arise as to whether a proposed change of use will amount to a ' material change of use '. A useful provision in this connection is section 17. Under that section any person who proposes to carry out any operations on the land or to make any change in the use of the land can apply to have the question determined by the local planning authority, and if he thinks their decision is wrong he can appeal to the Minister. Moreover, the Minister's decision will not be final as regards any appeal to the court under the provisions[64] of Part III of the Act relating to the enforcement of planning control.

Attention is drawn to the provisions of section 19, under which an owner can, in certain circumstances, require the Council of the county borough or county district to purchase his interest in the land where permission to develop the land has been refused, and of section 20, which entitles him to compensation if permission to carry out development of any class specified in Part II of the Third Schedule to the Act is refused.

Contrasting the powers dealt with in this article of local planning authorities and the Minister over land with the opening

[59] S. 20 (1).
[60] Proviso to s. 21 (1).
[61] S. 21 (2).
[62] Proviso to s. 21 (3).
[63] S. 21 (3).
[64] See ss. 23 and 24.

paragraphs of the article, one is forced to the conclusion that the common law has been deprived of its control over the development of the modern land law. Common lawyers have lost their control of the land law, which has passed to the Minister, local planning authorities, and other bodies, who are now given the opportunity of proving that not only common lawyers are imbued with the common law spirit, an assumption which common lawyers have, in the past, been too prone to make. As has been said by a national newspaper, 'In determining the use of land, sectional and temporary interests have all too often hitherto done lasting harm to the community's interests. The remedy is being sought—by general consent—in planning, in an attempt to guide the nation's physical apparatus of life and work according to some conscious design in order to secure communities of the right kind in right places. Success depends wholly on the quality of the planners' work and the extent to which it is made the affair of the community, not merely of its officials. . . . When planning reaches beyond the design and internal layout of individual communities to study of regional and national needs the largest requirement is for wisdom and coherence in the decisions of the central authorities. It is here that community and territorial planning merges with strategy, economic policy, and politics. . . . The great hope, and sole justification, of the new system of determining the use of land is that its decisions may be better in their economic, social, and aesthetic consequences than the haphazard decisions of the past'.[65] It is earnestly hoped that the new developers of the land law will be able and willing to rise to the occasion. Let them at all times remember that 'The British people, almost without knowing it, are embarking upon one of the greatest experiments in the social control of their environment ever attempted by a free society. In the process they are putting old individual liberties in trust for the common good. The citizen surrenders his freedom to obstruct other people in the hope of gaining greater freedom from obstruction by other people, and he will judge the outcome by the degree to which his freedom in worthwhile matters is in fact enlarged'.[66]

Richard C. FitzGerald.

[65] Leading article, 'Town and Country Planning', in *The Times* newspaper dated July 1, 1948.
[66] *Ibid.*

LEGISLATION THROUGH ADJUDICATION. THE LEGAL ASPECT OF FAIR WAGES CLAUSES AND RECOGNISED CONDITIONS (II)

VIII

Enough has been said in the preceding pages to show that, by the end of the 'thirties, the Fair Wages Resolution of 1909 had begun to look very old-fashioned. Not only industrial relations themselves, the rapid growth of collective bargaining and of voluntary conciliation and arbitration, but the draftsman's art had outstripped the efforts of the Edwardians. New methods of defining standards and of formulating sanctions had been developed and had found their way into statutes and contracts. By 1937 the time had arrived to adapt the Fair Wages Resolution itself to the needs and attainments of a new generation, and a tri-partite committee, consisting of representatives of the Government, the British Employers' Confederation and the Trades Union Congress was set up [73] which, in 1942, agreed upon a new resolution. This draft was published by the Government [74] and after the end of the war submitted to, and passed by, the House of Commons.[75] An attempt will be made to summarise the principal reforms which it introduces :

1. In addition to the obligation to pay fair wages and observe fair conditions a contractor must now undertake to ' recognise the freedom of his work-people to be members of Trade Unions '. The Government is not, of course, by this clause enjoined to or prevented from insisting on the ' closed shop ' in any of its many forms. The resolution is neutral towards this question. It ostracises what is known in English industrial history as the ' document ' [76] and in America as the ' yellow dog ' contract. In 1909 the freedom to organise was still problematical in some sections of British industry —the railway strike of 1911 is sufficient evidence [77]—but, in 1942, it had come to be recognised as one of the ' rights of man ' no less fundamental than any of the *droits de l'homme et du citoyen* written into the Constitution of any State in the Old World or the New. To withhold this freedom is now considered as an unfair practice of a bad employer. Hence its codification in the new Fair Wages

[73] *Industrial Relations Handbook*, *l.c.*, p. 137.
[74] Cmd. 6399.
[75] On Oct. 14, 1946. 427 Hansard, col. 718. A Conservative amendment which tried to proscribe the closed shop was defeated (*ibid.*, col. 706). After that the resolution was passed without a division. Its principles were unanimously accepted. The debate turned almost entirely on the closed shop problem.
[76] Webb, *History of Trade Unionism*, p. 215.
[77] Webb, *l.c.*, p. 528.

Resolution could not meet with any resistance. It has ceased to be an object of dispute and been lifted into the sphere of those uncontroverted principles of social life which are rarely discussed and always in operation.[78]

2. The separation between wages and hours on one side and 'conditions of employment' on the other which encumbered the 1909 resolution has been dropped. The contractor's obligation is expressed in such a way as to comprise 'rates of wages . . . and hours and conditions of labour' equally. This follows the practice adopted in the statutes discussed above under VI. Accordingly, the test of what is 'less favourable' has become universal. 'The contractor shall pay rates of wages and observe hours and conditions of labour not less favourable than' the standard of fairness. (No. 1 (*a*).)

3. That standard of fairness has been thoroughly redefined. Here the new resolution reflects not only the growth of collective bargaining but also the development of its methods and the improvement in the actual observance of collective standards. The primary obligation of the employer is to observe the terms of collective agreements and voluntary awards. No longer is it relevant whether these terms are 'commonly recognised'. What matters is whether they are 'established'. The agreement or award as such, not the extent to which it succeeds in creating a habit of behaviour, is the criterion. The uncodified 'trade practice', on the other hand, is not.[79] This redefinition of the sources to be considered in judging fairness reflects the crystallisation, the more systematic organisation of collective bargaining, as well as its enhanced prestige. Agreements and awards, once established, can now be expected to be 'recognised', practices not included in them may be deemed not sufficiently significant to be taken into account.

4. As in 1909 the collective terms to be observed are those valid 'in the trade and district in which the work is carried out'. They must be contained in an agreement or award ('established . . . by machinery of negotiation or arbitration') to which the parties on *both* sides are organisations. So much does collective bargaining by employers' organisations prevail over bargaining by single employers, so much has the 'shop agreement' receded into the background, that an agreement made by the employer himself with a union is incapable of yielding a standard of fairness. The revival of bargaining by individual employers, necessarily inherent in the

[78] It is very significant that during the Second World War it was unnecessary to enact a statutory provision safeguarding the employees' freedom to join organisations, as had been done during the First World War: Munitions of War Act, 1917, s. 9.

[79] Under the Conditions of Employment and National Arbitration Order, 1940, Art. 6, and under the Restoration of Pre-war Trade Practices Act, 1942—discussed below—uncodified trade practices are protected by—voluntary or compulsory—codification. Contrast the Restoration of Pre-war Trade Practices Act, 1919, which still assumes that it is possible to give legal sanction to the restoration of an uncodified practice.

nationalisation of industries, will scarcely affect the Fair Wages Resolution. The observance of fair standards in nationalised industries is guaranteed by other safeguards which are outside the scope of this paper.[80]

5. It would, on the other hand, be wrong to ascribe to the resolution an intention to implement *pacta sunt servanda*. Whether the employer is a member of the organisation party to the agreement or award is irrelevant, as is the question whether the workers concerned are organised. The collective agreement (or award) yields a standard of fairness, no longer, it is true, *qua* crystallised custom but not, on the other hand simply as a 'contract' either. It is the relevant measuring rod because, by its making, it becomes 'the law' (in a non-positivist sense) of the trade and district, for federated employers and for outsiders, for workers members of the contracting union or unions as well as for others. This—again in a sociological sense [81]—'law-making' power, however, could not have been given to all organisations on both sides. It is *conditio sine qua non* that they must be 'representative respectively of substantial proportions of the employers and workers engaged in the trade or industry in the district'.[82] The reward of good organisation and of unity is the power to make 'law'. At first sight this may be thought to open a vista of intractable 'jurisdictional' disputes which may well take the form of a question whether a given organisation is 'substantially representative'. Once it has established that it is, any employer will be free to choose from a number of competing collective regulations to which rival unions have been parties. This, however, is a remote contingency in view of the structure of the trade union movement. Demarcation disputes, *e.g.*, between craft unions and industrial unions, or between either and 'general' unions can, as happened in the case of the railway shopmen,[83] always be settled by the Industrial Court.

6. What happens in the absence of a relevant collective agreement or award? The 1909 Resolution adopted the two alternative subsidiary standards of the practice of good employers and the practice in the nearest comparable district; and the legislation of the 'thirties included the terms applicable to similar work as a third ancillary criterion. The expansion of collective bargaining has deprived not only this question of much of its importance, but the 'good employer' yardstick of most of its significance: good employers see to it that terms are formulated by collective negotiation. The 'similarity' test, on the other hand, is still with us, but in a generalised form without the casuistic distinction between geographical and occupational similarity. What is done generally—

[80] *E.g.*, s. 46 of the Coal Industry Nationalisation Act, 1946 (9 & 10 Geo. 6, c. 59).
[81] Ehrlich, *Fundamental Principles of the Sociology of Law*, Chap. 17 and passim.
[82] The test whether an organisation (or employer) is 'substantially representative' seems to appear for the first time in s. 2 (2) Proviso of the Wages (Temporary Regulation) Act, 1918. It was destined to become very important.
[83] See above, note 69.

normally—by similar employers must be done—becomes normative —for all. In the absence of collective terms, practices observed (for whatever reasons) in similar circumstances are the test of fairness. The unions are powerful enough to see to it that general practices are not 'unfair'. In short, the subsidiary measuring rod has now been simplified so much that its definition could be compressed in the formula of 'the general level of wages, hours and conditions observed by other employers whose general circumstances in the trade or industry in which the contractor is engaged are similar'. The progress of the law is from casuistry to abstraction. (No. 1 (*b*).)

7. Who are to be the beneficiaries of the 'fair wages' policy? The 1909 Resolution—though inexplicit—seems to contemplate only those workers who are engaged on work done by the contractor or sub-contractor directly or indirectly for the Government, and this is confirmed by the express terms of all the statutes passed between 1925 and 1938. Here the new resolution makes a clear break with the past. No longer are there to be protected workers and unprotected workers working side by side. The rapid displacement of craft unionism by industrial unionism has made it possible to drop the test: 'is the man on Government work?' and substitute the simpler and more effective test: 'is he working at a place where Government work is carried on?' A contractor or sub-contractor undertakes to comply with the resolution 'in respect of all persons employed by him (whether in execution of the contract or otherwise) in every factory, workshop or place occupied or used by him for the execution of the contract'. By referring to the locality of work rather than its quality, the resolution takes a leaf out of the book of British factory law [84] which imposes obligations on 'the occupier'. The employer submits to a general norm of conduct, he no longer merely undertakes to carry out the particular contract in a particular way. The English law of contract is sufficiently developed to be able to recognise even this sweeping term as a 'condition' in the technical sense of the common law.

8. For it is as a contractual condition that the fair wages clause continues to operate in the sphere of 'law' (in the positivist sense). However, is this quite sufficient in practice? What guarantee is there against the endless complications involved in rescinding a contract made by a Government department on the ground that the contractor failed to observe or to induce sub-contractors to observe 'fair' terms? What guarantee is there—in the absence of a statutory system of inspection—that the Government departments will even be reliably informed of what is happening in the workshops and on the building sites? They can inspect the contracts made between contractors and sub-contractors, but will they know whether or not those who promised to be 'fair' decided to 'jump

[84] Factories Act, 1937, s. 130.

off ' as soon as they had secured their coveted Government contract or, at any rate, as soon as the work was completed? These are not empty speculations, as experience made during the depression between the Wars has shown to evidence.[85] Those who drafted the Resolution of 1942 were very well aware of it, how well is shown by their invention of what one is tempted to call the ' preventive sanction '. They did not feel able to do much in the case of the sub-contractors (except so as to impose on contractors the obligation to notify on request the department of their names and addresses (No. 6)), but in the case of the contractors themselves, they attempted—somewhat feebly—to ensure that only firms would be employed who were in the habit of observing ' fair ' terms, Government contract or no Government contract, and hence not so likely to ' jump off '. ' Before a contractor is placed upon a department's list of firms to be invited to tender, the department shall obtain from him an assurance that to the best of his knowledge and belief he has complied with the general conditions required by this resolution for at least the previous three months ' (No. 2).

9. It may be felt that this is rather inadequate. A far stronger safeguard will be found in the incorporation of the ' publicity ' condition in the general Fair Wages Resolution. We have met it in the 1935 transport agreements and see it now improved and strengthened in the 1942 Resolution (No. 5) : ' The contractor shall at all times during the continuance of a contract display, for the information of his workpeople, in every factory, workshop or place occupied or used by him for the execution of the contract a copy of this resolution '. This is—by clause No. 6—extended to sub-contractors. What matters is, of course, that through the trade unions or otherwise, the publicity of the norm is likely to ensure the publicity of its violation, and, consequently, the necessary remedial action. This is an insufficient substitute for the ' administrative sanction ' of inspection by departmental officers, but *jus publicum privatorum pactis mutari nequit* and we have not so far felt able by a private law contract to add to the jurisdiction of administrative agencies. Perhaps one day, with the growing awareness of the unity of public and private law, this doctrinal obstacle will be overcome [86] and factory inspectors or inspectors acting under the minimum wage laws be charged with the duty of enforcing the Fair Wages Resolution. But that day is not yet.

10. In theory ' any question arising as to whether the requirements of this resolution are being observed ' must be solved—through the operation of the law of contract—by the courts. But the spectre of a lawsuit between the department and its contractor had to be avoided. It has been the endeavour—for good reasons—of all those concerned to keep questions of collective labour law

[85] See the speech by the Minister of Labour, 427 Hansard, col. 625.
[86] As suggested by the Advisory Committee, see above, note 71.

out of the courts. The recourse to arbitration within the meaning of the Arbitration Acts, 1889 to 1934, is no remedy, because—as a result of the mechanism of the ' case stated ' [87]—this involves the risk of a case in court. Nor was it possible, by a mere resolution of the House of Commons, to generalise the system of ' legislation by litigation ' before the Industrial Court which, as we have seen, was used by statute in order to enforce fair wages clauses without contractual operation. Hence a vague and non-committal formula was devised which has the great advantage of concentrating all questions of observance or non-observance in the expert hands of the Industrial Relations branch of the Ministry of Labour and prevents the contracting departments from making up their minds on questions on which they are not likely to have much experience. If the Minister of Labour fails to settle the dispute he must refer it ' to an independent Tribunal for decision '. This obviously means an industrial arbitration tribunal, that is a body like the Industrial Court (though not necessarily the Industrial Court itself) whose proceedings result in a creative—not an interpretative—award without ' legal ' enforceability but with sufficient moral prestige to secure obedience in fact. It means, in effect, that the —existing—' legal ' sanction of the Fair Wages Resolution through the law of contract is displaced by ' industrial equity ', that is by the far more powerful non-' legal ' sanction of non-compulsory industrial arbitration (No. 3).

IX

With the adoption by the House of Commons of the Fair Wages Resolution drafted in 1942 the evolution of the contractual machinery for the safeguarding of fair standards has, for the time being, been completed. The definition of these standards has now reached a certain maturity, and the resolution in its latest form signifies the closest possible approximation between fair standards and collective bargaining.

Yet, the story does not end here. As a consequence of developments immediately before and during the Second World War, the method of enforcement used in the past for statutory fair wages clauses has unexpectedly leapt into prominence, and ' legislation by adjudication ' has ceased to be an isolated phenomenon.

In order to understand how this occurred it is necessary once more to go back to the inter-war period and to consider the legal history of a British industry which has been an apple of discord among conflicting interests (and economists) more than any other. The transport of passengers and goods by road grew, after 1918, to dimensions which began to menace the railways, and which might have led to serious overcrowding on the roads. This raises economic problems of the first magnitude with which we are not here

[87] Arbitration Act, 1934, s. 9.

concerned.[88] Since the Road Traffic Act, 1930,[89] passenger transport, and, since the Road and Rail Traffic Act, 1933,[90] goods transport on the roads, has been subject to a licensing system. Under the former statute an operator desirous of running a motor bus or coach, *i.e.*, of providing a road service for the carriage of passengers for hire or reward at separate fares, requires a 'road service licence' for each vehicle to be so used.[91] Under the 1933 Act a road haulier, *i.e.*, a carrier of goods by motor road vehicle for hire or reward, must take out a public ('A') or limited ('B') carrier's licence for each vehicle (lorry, van, trailer, etc.). An 'ancillary user', *i.e.*, a firm other than a carrier, must take out a private ('C') carrier's licence for every motor road vehicle it wishes to use in its trade or business, but this licence, in contradistinction to the road service, A and B licences, is 'as of right' and not discretionary.[92] All these licences are subject to statutory conditions, violation of which may lead to suspension or revocation of the licence.[93]

1. In the passenger transport industry one of these conditions is the fair wages clause.[94] Under the 1930 Act it was at first formulated in the manner adopted in all the relevant statutes of the 'thirties, and, as a matter of history, the Road Transport Act of 1930 was the first to include 'conditions' as well as 'wages' and thus to set the pace for the statutes passed since 1936.[95] It did, however, in its original form, fail to give proper guidance as to the standards to be applied in enforcing the clause, a defect remedied by an amendment included in the 1933 Act[96] by which—again for the first time—the criterion of occupational similarity was introduced, in the common form consistently used in later enactments.[97]

It is when we come to the problem of sanctions that the Act of 1930 assumes real interest. It was not as if there had been any difficulty in enforcing the fair wages clause. No procedure could have equalled in stringency the threat of a revocation, or even suspension, of the licence. It was the very potency of these remedies which made it necessary to devise particular safeguards in the interest of justice and of the 'rule of law'. Moreover, there remained the question how to bring alleged violations to the notice of the licensing authority. The Act thus had to determine who would be able to complain of unfairness and who would ultimately decide whether or not fair conditions had been observed.

88 See G. Walker, *Road and Rail.* An inquiry into the economies of competition and State control, London, 1942.
89 20 & 21 Geo. 5, c. 43.
90 23 & 24 Geo. 5, c. 14.
91 Sections 72, 61.
92 Sections 2 and 6 of the Act of 1933.
93 1930 Act, s. 74; 1933 Act, s. 13. It is also a criminal offence: 1930 Act, s. 71 (10); 1933 Act, s. 9.
94 1930 Act, s. 93 (1).
95 See above, No. IV, note 55 *et seq.*, at p. 285.
96 Section 32 (1).
97 See above, No. VI, note 61, at p. 287.

The right of complaint is given to ' any organisation representative of the persons engaged in the transport industry '. There is nothing new in appointing the trade unions to be guardians of the fair standards : it merely expresses an existing practice. It appears, however, that they have the exclusive right of complaint, a principle first embodied in the post-Armistice legislation of 1918, and an indirect recognition of the identity of fair and collective standards. The licensing mechanism has been deliberately put to the services of the indirect enforcement of collective bargaining.[98]

The licensing authority is, of course, the proper recipient of the complaint. But what the complaint sets in motion is not the ordinary administrative procedure before the licensing commissioners. There is a ' *lis* ' a ' matter in dispute ', in dispute between the licensee and the trade union, capable of being ' disposed of ', and, if not ' disposed of ' liable to be referred to the Industrial Court by the Minister of Labour ' for settlement '. No one can doubt that these provisions are in accordance with common sense: there is nothing to prevent the licensing authority from trying to bring about a settlement by way of collective agreement and thus to assume the unwonted task of an industrial mediator.[99] As a rule, however, the licensing Commissioners will hardly be a *forum conveniens* for what is in essence an industrial dispute—but a dispute on existing rights—in the guise of an administrative case. Nor is the Ministry of Transport the proper department to deal with such matters.

The ' matter in dispute ' is referred to the Industrial Court ' for settlement '. The use of this phrase cannot disguise the nature of the proceedings. The court may, of course, remove the complaint by ordinary voluntary industrial arbitration, and if, as a result, the trade union withdraws it, that is the end, for the trade union remains *dominus litis*. But, unless this happens, the court must decide whether the licence holder has broken the conditions of the licence.[1] It acts as a court, as a law-finding agency, and its finding that the licensee is guilty is a necessary pre-condition for, and, on the other hand, leads by force of law to, proceedings for, the suspension or revocation of the licence.[2] Thus, the Industrial Court becomes here an administrative tribunal, and the ' matter in dispute ' reveals itself as one of the numerous instances of *contentieux administratif* which—*pace* Dicey[3]—English law has developed.

2. Here, then, as under the temporary Act of 1918,[4] an industrial arbitration tribunal acts as a court pure and simple. There is no

[98] Section 93 (2) of the 1930 Act. See above, note 82.
[99] See Mahaffy and Dodson, *Road Traffic Acts and Orders*, p. 150. A valuable summary of decisions of the Industrial Court is at pp. 259–260.
[1] The form of the decision is purely declaratory. See, *e.g.*, *Re H. Tuckwell & Sons, Ltd.* Official Decisions No. 1659 (1936), Vol. 18, p. 93.
[2] Section 93 (3).
[3] *Law of the Constitution*, Chap. 12.
[4] See above, note 38, at p. 280.

element of legislation in these proceedings. The court has no power to make new law, it does not fix wage rates or other conditions which become terms of the contracts of employment. Its duty to ' have regard to ' standards of conditions in similar occupations can only be invoked by the licensee by way of defence against the charge of having broken a condition of his licence. The court cannot use these standards in order to remould the industrial relations which form the subject-matter of the dispute. Obviously this is a most unsatisfactory type of procedure. It has the dual shortcoming that the standard to be enforced is vague and that the method of enforcement is rigid. The system of the Road Traffic Act shows by contrast the advantages of ' legislation by adjudication '. Its insufficiency was demonstrated by the events which occurred in the sphere of goods transport.

Originally, under the Act of 1933,[5] the fair wages clause was a condition of all professional goods carriers' (A- and B-) licences and the method of enforcement was the same as that applied to passenger road service licences. The staff of C-licensees, *i.e.*, of ' ancillary users ' of goods vehicles, was unprotected. The difficulties encountered by the unions in organising the road haulage industry prompted Parliament in 1938 to replace the fair wages clause by minimum wage legislation of the traditional type, but adapted to the peculiar needs of this industry.[6] This was an adequate method to fix the remuneration of drivers, attendants, etc., employed by road hauliers, but those in the service of ancillary users presented a problem as difficult as any problem of social legislation ever to have confronted Parliament.

The ordinary fair wages clause as a condition of the licence was no solution. Not only would it have suffered from the disadvantages inherent in the system of the 1930 Act, but the very basis for the formulation of a standard of ' fairness ' in the spirit of the House of Commons Resolution was missing. The drivers and attendants of these goods vehicles were scattered over the whole of industry and business. There is not,—and there cannot be,—a single collective agreement covering men serving employers of all descriptions. Their isolation among other workers was not only the main obstacle to the unions' efforts at organising them, but defied any attempt to use in their favour the normal fair wages clause. By the same token minimum wage legislation was out of the question. Statutes and statutory orders—like fair wages clauses—presuppose a high degree of uniformity in the social substratum on which they are designed to operate. On the other

[5] Sections 8 (2), 32 (2).

[6] Road Haulage Wages Act, 1938 (1 & 2 Geo. 6, c. 44), Part I, which establishes the Road Haulage Central Wages Board for drivers, attendants, etc. of vehicles used under A- and B-Licences. The application of the fair wages clause to these workmen came to an end with the repeal of the provisions of the 1933 Act mentioned above, note 5, by s. 17 (3) of the Act of 1938. See, for the history of the Act, Sells, *l.c.*, pp. 38–39.

hand, the circumstances which condemned any then known type of intervention to futility were the very same which made such intervention urgently necessary. Uniformity of standards was impossible, yet fair wages could only be achieved by statutory safeguards. The puzzle was how to find a measuring rod, if neither a voluntary standard nor a statutory minimum rule could, in the nature of things, be available. Who could be capable of bringing to bear upon a multitude of contracts of employment made by firms of the most varying types and sizes a standard of adequacy which so obviously defied exact formulation?

The answer given by Part II of the Road Haulage Wages Act is unambiguous: it is the system of 'legislation by adjudication' which was alone capable of solving the problem, but the system had to be adapted to the particular uses to which it was now put.

3. In one respect the Act is—and had to be—less progressive than some of the statutes previously discussed in this paper: it deals with 'remuneration' and 'holiday remuneration' only, not with hours or other conditions.[7] Nor does it make any attempt to formulate what is 'fair' remuneration, it merely says when remuneration 'shall not be deemed unfair', and it assumes rather than expresses the employer's obligation to pay what is 'not unfair'. The 'fundamental law' to be enforced is, in this case, even less capable of exact definition than in other cases discussed in this article.

The pattern of the fair wages resolutions is followed in that, in the first place, payment in accordance with a collective agreement directly applicable to the work in question is always 'fair'.[8] It does not matter, however, whether the organisations parties to the agreement are 'representative', while, on the other hand, the collective agreement can only be used as a standard if the employer himself or his organisation was a party to it. Whether or not the worker is organised, is irrelevant.

In the second place, a list of alternative standards is provided each of which excludes the charge of unfairness. In view of the facts of the situation, this is of vastly greater importance than in the case of the ordinary fair wages clause. In this catalogue of five available alternatives the collective agreement directly applicable figures not even as *primus inter pares*, and one suspects that, in practice, some of the other yardsticks of fairness are much more prominent.[9] Thus, remuneration is not unfair if it is the equivalent

[7] Road Haulage Wages Act, 1938, s. 4. The definition of a 'wage regulating authority' in s. 5 of the Holidays with Pay Act, 1938, includes the Road Haulage Central Wages Board, but not the Industrial Court, but s. 5 (2) of the Road Haulage Wages Act, 1938, authorises the court to fix holiday remuneration (not holidays). Indirectly—by fixing overtime rates—the court can influence working hours: s. 5 (4).

[8] Section 4 (3) (*b*).

[9] Section 4 (3). Note, however, the difference in wording between (*b*) and the other sub-paragraphs. Remuneration is not unfair if it is 'in accordance with' a collective agreement directly applicable, or 'equivalent to' one of

of the minimum payable for similar work under a road haulage wages order, *i.e.*, to drivers, attendants, etc., employed by professional road hauliers. Minimum wage legislation supplies one of the alternative standards of fairness outside the province of its direct operation : A department store pays a ' fair ' wage to the drivers of its furniture vans if the payment equals that which a furniture remover has to pay under an order of the Road Haulage Central Wages Board.[10] The right to apply ' similar ' standards has been taken over from the Fair Wages Resolution and from the earlier statutes of the 'thirties, but it is expressed in a form even more casuistic than that of the resolution of 1909 and of the statutes discussed above under VI, and much inferior to that used in the resolution of 1942. The test is one of occupational similarity and geographical identity. The employer is entitled to pay the equivalent of what similar workers doing the same work (driving, attending, etc.), for other employers in the same district and trade or industry earn under decisions of joint industrial councils, conciliation boards, etc., or collective agreements. He cannot, however, rely on any of these collective wage regulations unless they apply in his own district, and a collective agreement will not avail him unless, on the employers' side, it has been made by an organisation which is ' substantially representative '.[11] Finally, where remuneration has been fixed by the Industrial Court in the proceedings presently to be described, any other employer in the same district and trade or industry acts ' fairly ' if he pays its equivalent to his own road haulage workers.[12]

The law has thus tried to make the virtue of flexibility out of the necessities presented by bad organisation and lack of cohesion between the workers concerned. In view of the multifariousness of trades and industries with which it had to deal, it was unable to use the collective agreement as the sole or even the primary crystallisation of the ' fundamental law ' of fairness. It thus resorted to a number of alternative agencies each of which may, in its own way, set up a standard and thus, in a sense, give a ' law ' to the parties : the Road Haulage Central Wages Board, the parties to a collective agreement, a joint industrial council or the Industrial Court itself. A ' law ' to the parties—but only in the sense that compliance with these norms removes the charge of unfairness, not that the worker has a claim to their observance. The employer who pays in accordance with any of them can use it as a defence in the proceedings to be outlined below; the worker cannot enforce them directly. They are—to use the time-honoured phrase—a shield, not a sword. They are, however, also material available to the Industrial Court in shaping its own standard.

the other standards. In one case the standard is a norm of conduct, in the other cases merely a norm of calculation.

[10] Section 4 (3) (*a*).

[11] Section 4 (3) (*c*) and (*d*).

[12] *Ibid.* (*e*).

4. The scheme of the Road Haulage Wages Act culminates in an act of legislation by adjudication and thus follows the pattern set by the statutes analysed above. It is, however, far more explicit and elaborate, both in the procedure leading up to the award, and in the sanctions which secure its enforcement. In every respect the semi-legislative and semi-judicial nature of these proceedings becomes evident.

The complaint of unfairness may be made by the worker concerned or his union. But it may also be made by any union which represents a substantial number of road haulage workers, whether or not any worker affected by the proceedings is its member, and whether or not it represents any workers in the district in which the complaint arises. This careful definition [13] of the *locus standi* shows that a union which uses these proceedings is intended not only to act as the 'watchdog' of existing standards, but also as the promoter of new ones—as unions always do when appealing to arbitration agencies.

The form of the complaint is that of a request to the Minister of Labour 'that the matter be referred under this Part of this Act for settlement'. If a union so chooses, it may report the matter as a trade dispute under the Industrial Courts Act, and obtain an unenforceable award under that statute. The Minister has no influence on this choice of remedies. If the applicant relies on the statute of 1938, the Minister must proceed under that statute. His functions are merely those of a conduit pipe. He cannot dismiss the complaint *a limine* unless he finds that it is 'frivolous or vexatious'. It is not for him to say whether the remuneration paid by the employer was 'unfair'. He may try to settle the matter by 'representations' to both sides and thus induce the applicant to withdraw the complaint. Failing this, he must pass it on to the proper agency by way of 'reference' which—in the absence of special circumstances—must be done within one month.[14]

Which is the proper agency? Not necessarily the Industrial Court. The *modus procedendi* is deliberately modelled on the pattern of the voluntary arbitration system of the Industrial Courts Act. However different 'legislation by adjudication' may be from voluntary arbitration, the principles of social policy which govern both are identical. One of these is the preference for settlement by agreed negotiation machinery, and this preference asserts itself, so to speak, at the eleventh hour. An application under the Act can and must be referred by the Minister to voluntary conciliation or arbitration machinery set up in the trade or industry under collective agreements made by substantially representative organisations, provided the employer concerned is a member of the organisation

[13] Section 4 (1). See also, s. 5 (7) by which any interested employers' organisation or trade union has a right to attend the hearing before the Industrial Court.

[14] Section 4 (4), (5) and (6).

which is party to the agreement on the employer's side. Only if this machinery fails to achieve a ' settlement ', can the Industrial Court be called into action, and then only upon a request made by *both* parties to the collective agreement. In the whole of the legislation discussed in this paper there is perhaps nothing more clearly indicative of the spirit which animates it than this provision, and nothing to prove more convincingly that we are not here concerned with the simple enforcement of existing rights under collective agreements or otherwise. The whole body of legal principles designed to safeguard fairness of remuneration, the whole policy of using cases of unfairness as so many ' pegs ' for the establishment of enforceable standards by a State-created agency falls to the ground if there is a collective agreement providing voluntary settlement machinery and the employer's organisation is a party to it. If that is the case, the law insists that the further destiny of the matter should rest in the hands of the contracting organisations. Neither the individual employers nor the workers nor any outside union can then invoke the Industrial Court. Not even the contracting union or employers' organisation can do so, alone. They can only do it together as a matter of common policy for their industry. Where voluntary conciliation machinery exists, the State refuses to enforce ' fairness ' unless invited to do so by the combined organisations on both sides.[15]

5. None of the earlier statutes vesting these legislative powers in the Industrial Court had defined its functions in detail, and none had tried to explain what happens if the charge of unfairness is not proved. Here the Act of 1938 is much more explicit. If the employer can show that the remuneration paid by him was ' fair ' in the technical sense defined above, the complaint will be dismissed,[16] and in so far it might seem, at first sight, as if the task of the court was judicial in the traditional sense. But the statute clearly shows that the court may come to the same conclusion although not one of the alternative standards which serve as ' measuring rods ' had in fact been complied with. It may and must have regard to all ' further circumstances ' it considers relevant, among them collective agreements made for ' comparable ' industries regulating the remuneration of workers engaged on work ' similar ' to that forming the object of the complaint and the general level of remuneration obtaining for workers other than road haulage workers in the industry in which the complaint arose.[17] In other words the court must formulate its own standard of ' fairness '. In defining what is ' fair ' it gives effect to a policy, not to a crystallised legal norm. The employer has, so to speak, two lines of defence: a strictly legal

[15] Section 4 (4) Proviso. The subsidiary character of the proceedings is further illustrated by s. 4 (2) Proviso which excludes their application to workers subject to a statutory minimum wage regulation.

[16] Section 5 (1).

[17] Section 5 (3).

line, and, if that is breached, a line *de lege ferenda*. He may ask the court to make law in his favour. If the court accedes to his request, its function is performed. If the remuneration is what, in the view of the court, it was 'fair' to pay, nothing further will happen.

If the court reaches the opposite conclusion, it will fix 'statutory remuneration' (including holiday remuneration), and, in doing so, 'have regard' to all the standards which might have been used as alternatives by the employer and, in addition, to the 'further circumstances' mentioned in the previous paragraph. In adapting the formulation of the powers of the court to that generally used for wage regulating authorities, the law makes it as clear as one can wish that enforcement of existing norms, subsumption of facts, etc., in short, the judicial process has been left far behind. But what looms in the background is the 'fundamental rule' of 'fairness'.[18]

6. The powers of the court are similar to those of a wage regulating authority, but the scope of its ruling is, as under all the statutes providing for this type of procedure, limited to the employer whose case was before the court 'and all workers employed by that employer on that work'. It is not, of course, simply *res judicata inter partes*, but it is not, on the other hand, like a minimum wage order, 'law for the trade'. It is no more—and could in view of the facts of the situation be no more—than a 'law for the enterprise'.[19] As such it remains in force for three years, but proceedings for review may be opened by the employer or the worker or their organisations after three months.

As between the employer and the worker who made the original complaint the decision may be made retrospective up to six months and thus to enable the worker to sue in a civil court for a back-pay order. The ruling of the Industrial Court operates thus, as it were, at three levels: for the contract of employment which gave rise to the proceedings it is (or may be) retrospective enforceable law, for the whole of the employer's enterprise it is non-retrospective enforceable law, and for the whole district and trade it is—we have seen it—a 'standard of fairness' and thus a defence in future proceedings.

These rulings of the Industrial Court are enforced exactly like wage regulating orders, and in accordance with the same provisions which apply to the enforcement of statutory remuneration fixed by the Road Haulage Central Wages Board.[20] The content of the order becomes a compulsory term of the contracts of employment to which it applies and cannot be contracted out to the detriment of the worker.[21] Non-compliance is a criminal offence,[22] and

[18] Section 5 (1)–(4).
[19] Section 5 (6).
[20] Section 6 *et seq.*
[21] Section 6.
[22] Section 7 (1)–(3).

observance is secured by the system of inspection which constitutes the administrative sanction for minimum wage regulation in British law.[23] It is not, however, a condition of the employer's licence.[24]

Thus, while the standards to be applied and the procedure to be used belong to the tradition of the fair wages clause, the result of these proceedings is an order very closely akin to a minimum wage order. What began as a *lis* ends in a piece of delegated legislation.

X

The idea to adjust differences about existing standards by crystallising them into an act of delegated legislation had, until the outbreak of the Second World War, only been used for selected industries, subject to special legislation in connection with subsidies, licences, etc. When, in 1940, the war situation forced the Government to abolish the unconditional right of strike and lockout and to introduce a system of compulsory arbitration,[25] something had to be done to secure the enforcement of collective standards by legal means and to provide for the settlement of questions concerning their observance. An obligation to observe 'recognised terms and conditions' was imposed on all employers, and the formulation chosen in order to define such conditions and terms was identical with that subsequently embodied in the Fair Wages Resolution drafted in 1942.[26] They are 'terms and conditions of employment which have been settled by machinery of negotiation or arbitration to which the parties are organisations of employers and trade unions representative respectively of substantial proportions of employers and trade unions in that trade or industry in that district'.[27] The criterion used to single out from the general body of collective agreements those deemed to merit legal protection is found not in the contents, but in the character of the parties which have concluded it. An agreement made between a union and a single employer is not so protected. Such 'shop agreements' are the exception not the rule. The normal British collective agreement is 'collective' on both sides. A single firm—however large and important it may be—cannot, by negotiating with a union, impose upon itself a legal obligation to observe the terms agreed upon. Nor can it even necessarily do so by joining an employers' association. For the terms negotiated by an association with a union are 'recognised' only if both bodies are 'substantially representative'. On the other hand, no employer can, by keeping outside an organisation, escape the duty to observe such terms, for it is irrelevant

[23] Section 11.
[24] Section 7 (4) does not apply to C-Licensees.
[25] Conditions of Employment and National Arbitration Order, 1940, above, note 7, at p. 271.
[26] Above, VIII, No. 4, note 80, at p. 431.
[27] Order of 1940, Art. 5 (1). The effect of this Order on the law of collective bargaining has been analysed by the writer in the article mentioned above, note 4, at p. 271.

whether the employer—or, for that matter, the worker—concerned was a member of the contracting body.

It was not the policy of the law to translate this obligation into a claim for its enforcement vested in the individual workman. The employer who fails to comply with these terms commits a criminal offence,[28] but he is not liable to be sued for the wage difference or for damages by an employee.[29] The duty to observe recognised terms and conditions is incumbent on all employers in the trade and district, but, apart from the penal sanction, they are the 'law of the trade' only in the same sense as is the duty to pay fair remuneration under the Road Haulage Wages Act. They are not as such implied compulsory terms of the relevant contracts of employment. Nor are they protected by any other direct civil sanction. These terms are no more than a 'fundamental law' which can be enforced exclusively by a process of litigation leading up to an 'award' which is a legislative act. The statutory fair wages clause, especially in the form of the Act of 1938 and the type of procedure we have called 'legislation by adjudication', have thus proved to be of first-class importance for the evolution of British labour law. This has now been applied to the whole of industrial relations. The Order of 1940 is still in force and will remain in force until December 31, 1950. It was originally intended to replace it at the end of hostilities by Part III of the Wages Councils Act, 1945, and thus to substitute the jurisdiction of the Industrial Court for that of the National Arbitration Tribunal.[30] But by an order made under the Supply and Services Act, 1945,[31] the Order of 1940 was extended until December 31, 1950. Since Part III of the Wages Councils Act, 1945, expires on the same day, unless extended by Parliament, it may never achieve any

[28] Under Defence Regulation 92.

[29] *Hulland* v. *William Saunders & Co.*, [1944] 2 All E.R. 568. In this case an attempt was made to invoke the well-known principle of English law that 'wherever an Act of Parliament creates a duty or obligation to pay money, an action will lie for recovery, unless the Act contains some provision to the contrary'. (*Shepherd* v. *Hills* (1855), 11 Exch. 55.) The Court of Appeal refused to hold that, on this ground, a workman could obtain back pay merely because an employer had failed to comply with his statutory duty to observe recognised terms and conditions. Du Parcq, L.J. (as he then was), who delivered the judgment of the court, was able to demonstrate that the Order, by the provisions mentioned in the text, had excluded the worker's right to rely upon the employer's statutory duty as a basis for a claim to recover money. The decision is valuable for the clear distinction between direct enforcement, *e.g.*, of a wage regulating order, and the indirect enforcement by what, in this paper, is called 'legislation by adjudication'. This appears to be the only reported case on Art. 5. In *R.* v. *National Arbitration Tribunal, ex p. Midgley Harmer, Ltd.*, [1947] 1 All E.R. 196, Art. 5 was mentioned by counsel in a matter turning on Art. 2, and was rightly held to be irrelevant to the issue.

[30] Section 19 and Schedule III. Under the Act the penal sanction would have ceased to operate.

[31] Order in Council of December 20, 1945 (S. R. & O., 1945, No. 1620). See Ministry of Labour and National Service, Report for the Years 1939–1946, Cmd. 7225, for a description of the origin of this Order (at p. 279).

practical importance. In practice this affects the jurisdictional side of the matter, but not the substantive law, because the more important of those modifications of the scheme which were envisaged by the Wages Councils Act, 1945, had already been introduced by an Order of December, 1944, amending the Order of 1940.[32] This new scheme will remain an experiment, and continue to be used as a means of grappling with the situation of the immediate post-war period. Events will show whether Parliament will extend it, either on the ground that the temporary problems it is designed to solve are still with us at the end of 1950, or because it is deemed worthy to become a permanent feature of British law.

The employer is under an obligation to observe the recognised terms and conditions or other terms and conditions which are 'not less favourable'. The difficult criterion of what is 'favourable', at first used in the Fair Wages Resolution of 1909, has now been placed in this central position, but it has been linked with a catalogue of alternative standards.[33] The employer is at liberty to choose whether he wishes to apply the terms agreed or decisions rendered for the particular work concerned or for workers 'engaged in similar work'. He can avoid the pitfalls of demarcation disputes, since he does his duty if he complies with any recognised terms operating for any of his or similar workers in the district. The collective agreement which is directly applicable is not—as it is under the Resolution of 1942—the primary source of rights and duties which enjoys priority over the 'subsidiary' standards, but these standards are on a par, as under the Act of 1938.[34]

There are, on the other hand, a number of significant variations between the system of 'fair standards' under the Act of 1938 and the hierarchy of 'recognised terms' under the Order of 1940. Under the 1938 Act an employer may always act in accordance with an agreement to which he or his organisation is a party. The later legislation—like the resolution of 1942—gives precedence to the idea of collective regulation over the principle '*pacta sunt servanda*'. The employer's primary duty is to observe standards established by representative organisations, and he can rely on a 'shop agreement' concluded by himself only in the absence of an agreement made between, or a decision of a joint industrial council or similar body constituted by, representative collective bodies.[35]

The procedure designed to ensure that the collective agreements protected as recognised terms are observed resembles that invented in order to secure fairness of remuneration under the Act of 1938, but differs from it in a number of important respects. In both cases non-

[32] Conditions of Employment and National Arbitration (Amendment) Order, 1944, of Dec. 5, 1944 (S. R. & O., 1944, No. 1437).

[33] 1940 Order: Art. 5 (2). 1945 Act, Third Schedule No. 1 (2).

[34] 1940 Order: Art. 5 (2) (*a*) and (*b*). 1945 Act, Third Schedule No. 1 (2) (*a*) and (*b*).

[35] *Ibid.* (*c*). Awards by the Industrial Court and similar bodies are also an alternative source. *Ibid.* (*d*).

compliance can be reported to the Minister, referred by him to an impartial tribunal and used as an opportunity for a quasi-legislative decision which has the force of delegated legislation.[36] The 'fair standards' of the Act of 1938 can be embodied in a quasi-legislative decision if and only if a case of 'unfairness' has been proved in the Industrial Court. Similarly, the 'recognised terms and conditions' can be brought before the relevant authorities only in the form of an actual and disputed question as to their 'nature, scope and effect' or as to their observance (or the observance of alternative standards) by the employer. In both cases there must be a conflict on existing rights in order to enable a new quasi-leglislative ruling to be given. But here the analogy ends. The legislation of 1940 and 1945 is so little concerned with the protection of individual rights that—unlike the Act of 1938—it withholds from the individual worker and his union (as such) the power to report to the Minister. As under the Road Traffic Act, 1930, only an organisation can make the complaint, and it is irrelevant whether the worker is a member.[37] Nor is it the sanctity of the obligation, constituted by the collective agreement which the legislator primarily seeks to protect : organisations can set the enforcement machinery in motion whether or not they are parties to the agreement alleged to contain the recognised terms. It does, on the other hand, constitute the organisations on both sides as guardians of the public interest in the observance of collective standards : an employers' organisation may make the 'report' no less than a union, and whichever body be the complainant, all it has to show is that it 'habitually takes part in the settlement of wages and working conditions in the trade or industry concerned'. Organised employers' and organised workers' interests in general are involved : hence an organisation of either side may approach the Minister, irrespective of its representative strength, irrespective, too, of whether or not it operates in the district involved. Either an employers' organisation or a union may act in this way : this is not one of those cases in which the law requires joint action by both sides.

The Minister must refer the 'question' to an independent tribunal, as soon as it has been reported to him.[38] The war-time Order still exhibits that preference for voluntary machinery which we found to be so prominent in the Act of 1938, but the Act of 1945 has omitted the elaborate references to a 'settlement' by a non-official institution. 'If not otherwise disposed of', the case must

[36] 1940 Order, Art. 5 (3), 1945 Act, Third Schedule, No. 2.

[37] Since, under these provisions, the organisations clearly act in their own right and not on behalf of their members, the decision of the Court of Appeal in *R.* v. *National Arbitration Tribunal, ex p. Keable Press, Ltd.*, [1943] 2 All E.R. 633, which turns on compulsory arbitration under Art. 2, is irrelevant in the present context.

[38] Order of 1940 (as amended by the Order of 1944 quoted in Note 32, at p. 445), and under the 1945 Act the question can no longer be reported when twelve months have elapsed after it first arose.

go to the Industrial Court.[39] Experience may have shown that where a trial of organised strength in the form of a 'report' to the Minister has become inevitable, voluntary settlement has already been attempted and failed.

The 'question' will be answered by the Industrial Court (or National Arbitration Tribunal) in the form with which we are now familiar. If the employer has failed to do what he was liable to do, an 'award' will be made, and the 'question' *de lege lata* will thus receive an answer *de lege ferenda*.

A request for the declaration of the law will be the occasion for the making of new law, and not only all the alternative 'recognised terms' which the employer might have applied but also collective agreements in comparable industries will serve as material in this law-making process.[40] The award which emerges is not the law of the trade, but a compulsory implied term of the contracts of employment only as between the 'employers and workers to whom the award applies'.[41]

Under the Wages Councils Act this indirect protection of collective bargaining does not operate where workers enjoy the alternative and complementary safeguards provided by minimum wage legislation.[42]

XI

It is instructive to compare the enactments passed after the First World War with the present law. Then, as now, the desire to protect collective standards promoted legislation intended to secure compliance. But the machinery of the temporary Act of 1918 looks clumsy in the light of the more flexible system evolved during the long laborious history of the fair wages clauses: To the question

[39] Under the 1940 Order to the National Arbitration Tribunal, a war-time institution administering the system of compulsory arbitration.

[40] 1940 Order, Art. 5 (3), 1945 Act, Third Schedule, No. 3 (1).

[41] 1940 Order, Art. 5 (4), 1945 Act, Third Schedule, No. 3 (3). In practice—see the decision in *Hulland* v. *Saunders* above, Note 29, at p. 444—the question how far the award should be retrospective is in the foreground. Under the Order of 1940 (as amended in 1944) and under the Act of 1945 the award may be made retrospective to 'the date on which the question . . . first arose', and if the tribunal or court is satisfied that the employer failed to observe the relevant terms and knew (or ought to have known) this, the retrospective effect—and consequently the 'back-pay' order to be made by the civil court—must be extended to the 'date of knowledge'.

[42] Section 19 (1), proviso.—*Aliter* under the 1940 Order: see Art. 5 (2) (*e*). Minimum wage legislation and compulsory arbitration can exist side by side and apply to the same workers. In *R.* v. *National Arbitration Tribunal, ex p. Imperial Tobacco Co. and Others*, [1943] 2 All E.R. 162, a Divisional Court of the King's Bench Division held that the tribunal had jurisdiction over a trade dispute concerning workers subject to a trade board. By parity of reasoning the principle of this decision on Art. 2 of the Order can be applied to Art. 5. It can no longer be thus applied under the Act of 1945. This is regrettable because the scope of minimum wage laws is narrower than that of collective bargaining: 'Recognised terms and conditions' extend to matters such as apprenticeship, hours of work, etc., which are not covered by wage regulating orders. Nevertheless under the 1945 Act there cannot be any 'recognised terms' where a wage regulating order applies.

whether 'prescribed' rates of wages had been paid, the Interim Court of Arbitration could only answer: 'Yes' or 'No', unless it had been expressly requested to 'substitute' another rate.[43] This clear separation of judicial and legislative functions may have been logical, but the present system of 'recognised terms and conditions' responds far better to the needs of industry, though it may puzzle the jurist.

The merits of this system and its capacity for further development are also illustrated by the legislation which—after the Second as after the First World War—imposed upon employers the duty to restore, after the end of hostilities, those uncodified 'trade practices' which the unions had agreed to abandon in the interest of production. The substance of this obligation has remained the same,[44] but its enforcement under the relevant statute of 1919 was entrusted to a temporary criminal court of summary jurisdiction,[45] which was only in exceptional circumstances authorised to 'declare' the 'true interpretation of the obligation'.[46] Now measures were taken during the war to record and codify such practices,[47] and their restoration secured by a statute which leaves it to an arbitration tribunal, ultimately to define, by an act of delegated legislation, the precise nature of the obligation, the method of its performance, and its duration.[48] Neither the details of this legislation nor its desirability are germane to the present inquiry: as a pattern of legislative technique, it deserves the closest attention.

In the eyes of the social scientist there may be little difference between the settlement of a conflict of interests by compulsory arbitration and the decision of a dispute on existing rights by a legislative act. To the lawyer the distinction is fundamental. To him *jus dicere* and *jus dare* can never be the same. It may be of interest, beyond the narrow circle of those concerned with labour law, that in this field at least, law making has proved to be amenable to the judicial process.

O. Kahn-Freund.

[43] Wages (Temporary Regulation) Act, 1918, s. 2.
[44] Compare s. 1 of the Restoration of Pre-War Practices Act, 1919 (9 & 10 Geo. 5, c. 42), with s. 1 of the Restoration of Pre-War Trade Practices Act, 1942 (5 & 6 Geo. 6, c. 9).
[45] Section 2 (2) of the 1919 Act. The court was the munitions tribunal set up under s. 15 of the Munitions of War Act, 1915.
[46] *Ibid.*, s. 2 (5) which refers only to s. 1 (2), *i.e.*, to newly established firms and industries.
[47] Conditions of Employment and National Arbitration Order, 1940, Art. 6.
[48] Restoration of Pre-War Trade Practices Act, ss. 3 and 4.

DELEGATED LEGISLATION IN AMERICA—PROCEDURE AND SAFEGUARDS

The authority of administrative agencies to make rules and regulations having statutory effect is a power of enormous consequences. In its effect upon the community, its exercise is of scarcely less importance than the actions of the Legislature itself. Rules and regulations, no less than statutes, lay down patterns of conduct to which those affected must conform. 'Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails'.[1]

The importance of the administrative rule-making power and the need for its exercise under modern conditions has led to increasing emphasis upon the safeguards necessary to ensure against abuses. 'An unfettered exercise of power is certainly good for no one, and Government Departments are no exception to the rule'.[2] The conclusion of the Donoughmore Committee on this point can serve to illustrate the problem. 'We do not agree with those critics who think that the practice [*i.e.*, of delegated legislation] is wholly bad. We see in it definite advantages, provided that the statutory powers are exercised and the statutory functions performed in the right way. But risks of abuse are incidental to it, and we believe that safeguards are required, if the country is to continue to enjoy the advantages of the practice without suffering from its inherent dangers'.[3] The focus of inquiry has, therefore, shifted from the question of the desirability of delegation—few would dispute that today—to that of control. If we agree, as we must, that delegations of authority to administrative agencies are necessary, the problem then becomes largely one of safeguards.

From the point of view of the citizen affected, the primary safeguard to ensure the proper exercise of powers of delegated legislation lies in the development of adequate procedures to be followed by the administrative process in the formulation of rules and regulations. The development of such rule-making procedure has in the

[1] Mr. Chief Justice Stone in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942).

[2] Gwyer, 'The Power of Public Departments to Make Rules having the Force of Law', (1927) 5 J. of Pub.Ad. 404, 409.

[3] Report, 4.

past been largely a matter for the administrative agency concerned. This has probably been due to the fear that the legislative prescription of procedural requirements would make it difficult to maintain that flexibility in formulation, which is one of the chief virtues of delegated legislation. The absence of express statutory requirements has not, however, militated against the development of specific rule-making procedures on both sides of the Atlantic. The procedures thus adopted have been basically similar in both countries. Their purpose, broadly speaking, has been to ensure some participation to those affected by delegated legislation in the rule-making process. The basic problem, here, has been the democratisation of the rule-making process, 'without, at the same time, imposing such burdensome requirements that rules will either not be made or policy will be driven underground, as it were, and remain inarticulate or secret'.[4] To this end, certain procedural techniques have been developed; and the tendency in recent years has been in the direction of giving them statutory articulation.

The first of these techniques, consultations and conferences with those interests to be affected by the administrative rules and regulations, is almost an inevitable consequence of the growth of delegated legislation. 'As economic and other groups in the community became organised and vocal, and as legislation affecting them came more and more into existence, administrators, in contact with those upon whom their authority bore, turned to them for information and their points of view'.[5] It is natural both that those affected should seek to make their wishes known, and that officials should rely upon them for information on the problems to be solved. 'The complexity of these problems under modern conditions makes consultation with those who are "on the inside" virtually a necessity'.[6]

Such consultation of interests has tended to become a regular feature of the rule-making process. This has been especially true where the interests affected are well organised and vocal and hence able to be in constant contact with the administrative. The extent to which such consultation is relied upon by Government Departments in this country was amply demonstrated in the evidence before the Donoughmore Committee. Thus, the Secretary to the Ministry of Health gave 'an impressive list of the bodies consulted by the Ministry of Health before making new statutory regulations about the use of preservatives in food. Over sixty associations and individuals were notified of the draft proposals; these included various bodies representing food manufacturers, the London Chamber of Commerce, the Royal Sanitary Institute, the Society

[4] Report of the United States Attorney-General's Committee on Administrative Procedure, (1941) 225.
[5] *Id.*, at 103.
[6] Fuchs, 'Procedure in Administrative Rule-Making', (1938) 52 Harv.L.Rev. 259, 274.

of Medical Officers of Health, and so forth. The Ministry received some thirty deputations, altered its draft in consequence at a number of points, circulated a final revised draft to three of the most important bodies, and made further amendments to meet last-minute criticisms '.[7] It should be added that this was done without statutory requirement, and similar examples can be drawn from the experience of other departments.

This type of consultation is just as common in the American rule-making process. Few administrative agencies there whose work affects organised groups, especially economic groups, fail to maintain fairly regular contacts with them.[8] Where proposed regulations are framed by an agency the practice almost uniformly is for it to submit them to a long list of interested individuals and groups for suggestion and comment. This practice, which is common to almost all American administrative agencies, can perhaps best be illustrated with reference to the experience of a particular agency.

The Civil Aeronautics Board is entrusted with broad powers of rule making with regard to civil aviation. For the purpose of promoting safety in aviation, it issues voluminous regulations governing the construction and operation of aircraft. The primary responsibility for the drafting of such safety rules and regulations is vested in the Regulation Section of the agency, which is composed largely of lawyers, who are given the assistance of and are, to a considerable extent, in a field such as this, dependent upon technical staffs. The initial impetus for a rule or an amendment to existing rules usually comes from the technical staff in the agency concerned with the subject, though many suggestions are received from interested individuals or organisations in the industry.

In addition to receiving such suggestions, the consultative technique is made use of to obtain the views of the industry on proposed rules or draft rules. The most frequently used method is the submission of proposed drafts to those organisations representing the affected portions of the aviation industry. As the industry is highly organised, it is not too difficult to do this, and the general practice, indeed, goes so far as to send to the interested organisations enough copies of the proposed rule to distribute to their members. The comments which are received in reply are then considered by the Regulation Section and the appropriate technical units of the agency.

In order to ensure a more thorough discussion than would be feasible through correspondence, meetings or conferences have sometimes been held. The notices of such meetings, which are sent to interested individuals or organisations, have been accompanied by tentative drafts of the proposed rules which would serve

[7] Carr, *Concerning English Administrative Law*, (1941) 54.
[8] Fuchs, *supra*, note 6, at 275.

as a basis for discussion. Such meetings are generally informal and presided over by the members of the technical staff of the agency. A stenographic record of the proceedings is made, and, upon the completion of the conference, a digest of such transcribed record is made in the appropriate technical section and is considered in the formulation of the proposed rules.[9]

This practice of holding conferences of interested parties 'introduces an element of give-and-take on the part of those present and affords an assurance to those in attendance that their evidence and points of view are known and will be considered'.[10] Perhaps the most striking use of this conference technique in America was in the organisation by the Federal Trade Commission of trade practice conferences of representatives of an industry. The Commission, which has been given the function of preventing 'unfair methods of competition', sought to formulate rules defining such methods with the participation of the industry concerned, and adopted the conference technique to secure such participation.[11]

These practices of consultation and conference have tended to become standardised through the establishment of advisory committees drawn from an industry. The growing use of such advisory bodies to assist government in the performance of its duties has been characterised as 'one of the most striking developments in British constitutional practice since 1919',[12] and the development here has been paralleled to some extent by that across the Atlantic. These bodies have varied from ad hoc or temporary committees formed by the agency concerned to aid it in the drafting of specific regulations to more or less permanent advisory committees, whose composition and functions are elaborately prescribed by statute. Thus, such committees have been widely utilised in the promulgation of federal game and fishery regulations by the Department of the Interior, and advisory boards on a systematised basis have been established to offer advice concerning grazing regulations issued by that department. Perhaps the most notable use of this technique is under the Fair Labor Standards Act of 1938, under which minimum wages and hours are regulated by the Federal Government.[13] That Act requires that wage orders under it, varying the statutory minimum wage rates in particular industries, shall originate with industry advisory committees composed of employer, 'employee', and 'public' representatives.

The value of the consultative techniques we have been discussing—and especially the use of advisory committees—seems

[9] United States Attorney-General's Committee on Administrative Procedure, Monograph, Senate Document No. 10, 77th Cong., 1st Sess. (1941)—(hereafter cited as 'Monograph')—Part 6, Civil Aeronautics Authority, 59–62, from which the above account is largely derived.

[10] Report of the Attorney-General's Committee, 104.

[11] See Cushman, *The Independent Regulatory Commissions*, (1941) 220.

[12] Vernon and Mansergh, *Advisory Bodies*, (1940) 32.

[13] Under the congressional power to regulate interstate commerce. *United States* v. *Darby*, 312 U.S. 100 (1941).

obvious. As stated by Lord Haldane's Committee on the Machinery of Government, 'We think that the more they are regarded as an integral part of the normal organisation of a department, the more will ministers be enabled to command the confidence of Parliament and the public in their administration of the services which seem likely in an increasing degree to affect the lives of large sections of the community'.[14] Consultative techniques are, however, only effective when the interests affected are comparatively closely knit and well organised. 'The consultative type of procedure obviously is inapplicable where the groups affected by regulations are very numerous or the parties are unorganised'.[15] This is particularly true as far as the 'consumer' or 'public' interest is concerned. The problem of ensuring adequate participation by these interests in the rule-making process is a fundamental one, and attempts to deal with it have been along the line of appointing 'consumer' or 'public' representatives to the various advisory bodies which take part in rule making. Such attempts can at best give only partial articulation to the views of the unorganised interests affected. Thus, to cite the comments of one observer on the selection of 'public representatives' for the industry committees referred to above, under the American Fair Labor Standards Act, 'The Administrator has made a sincere and able effort to select . . . public members on the basis of merit, but merit for this rather novel function is an elusive factor. In some cases the public members are retail merchants, who are unusually conversant with technical details of the product and with the consumer's interest in its wage costs. Another main source of public members is the teaching profession'.[16]

Another means of obtaining participation in the rule-making process by unorganised interests is through the device of antecedent publicity, such as that provided for in this country in section 1 of the Rules Publication Act, 1893. Under that section, public notice was given of proposals to make 'statutory rules', and the department concerned had to consider representations or suggestions made by interested bodies, who were thus made aware of proposed rules of which they otherwise might not have known. Such antecedent publicity was characterised by the Donoughmore Committee as 'undoubtedly a safeguard of the highest value particularly where it leads to consultation with the interests concerned'.[17] A similar system of antecedent publicity is provided for in the American Administrative Procedure Act, 1946—a statute which imposes certain minimal procedural requirements upon the administrative

[14] Report (Cmd. 9230, 1918) 10.
[15] Fuchs, *loc. cit.*, *supra*, note 8.
[16] Dickinson, 'The Organisation and Functioning of Industry Committees' (1939) 6 Law and Contemp. Prob. 353, 356. For similar problems in this country under the Trade Boards Act, 1918, see Vernon and Mansergh, *op. cit.*, *supra*, note 12, at 300.
[17] Report of the Committee on Ministers' Powers (Cmd. 4060, 1932) 44. It is not, however, provided for in the Statutory Instruments Act, 1946, which repeals the Rules Publication Act, 1893.

process in that country.[18] Section 4 of that Act requires general notice of proposed rule making to be published in the Federal Register—the American equivalent of the Statutory Rules and Orders in this country. Such notice is to include : (1) a statement of the time, place, and nature of the rule-making proceeding; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. The agency concerned must then afford interested persons the opportunity to participate in the rule making through submission of written data, views, or arguments, with or without opportunity to present the same orally in any manner, and all relevant matter so presented must be considered by the agency.

The requirements of this section apply, in general, only to rules of a substantive character, ' interpretative rules, general statements of policy, rules of agency organisation, procedure or practice ' being expressly exempted. In addition, it is not to apply ' in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest '.[19] A general exception such as this is clearly necessary to ensure that the statutory requirement does not unduly hamper administrative efficiency. It may often not be to the public interest that advance notice be given of regulatory rules prescribing certain types of conduct. Thus, to cite the experience of the Securities and Exchange Commission, the American agency responsible, among other things, for the regulation of public utility holding companies—that Commission has often deemed it inadvisable to submit a proposed regulatory rule to the industry because of the danger that certain companies might take advantage of the interim period to effect transactions which the rule is designed to regulate and thus escape the intended regulation of conduct altogether.[20]

It is to be noted that section 4 of the American Act does not require the agency concerned to afford an oral hearing to anyone desiring to participate in the rule-making process. The use of such hearings in rule making has, however, become a common feature of the American administrative process in the present century. The hearing or auditive technique differs from the types of consultative techniques we have discussed above in that such hearings are publicly announced in advance and any interested party is permitted to attend and testify. They thus enable interests who might

[18] See Schwartz, ' The American Administrative Procedure Act, 1946 ', (1947) 63 L.Q.R. 43.

[19] There is also a general exception in so far as there is involved ' (1) any military, naval, or foreign affairs functions of the United States, or (2) any matter related to agency management or personnel, or to public property, loans, grants, benefits, or contracts '.

[20] Monograph, Part 13, ' Securities and Exchange Commission ', 105.

not be reached by the techniques of consultation and conference to present their point of view with regard to proposed rules. 'They are valuable to the extent that notice of them can be brought home to affected parties, that they are accessible to these parties, and that the questions involved are susceptible to intelligent discussion by those who do appear'.[21]

Such hearings have become quite customary in the promulgation of regulations governing safety in transportation. Many of the railroad safety regulations of the Interstate Commerce Commission are required by statute to be issued 'after hearing'. They are also held in connection with similar regulations with regard to aircraft and marine navigation, although not required by statute, it being the announced policy of the agency concerned in the latter field to hold hearings upon 'all regulations of extensive scope and character'.[22]

The use of public hearings has, indeed, become so common as an aid to administrative rule making in America that even a bare list of the fields in which they are held would be unduly long. Suffice it to say, in the words of an important study, that 'hearings are now generally held in connection with the fixing of prices and wages, the prescription of rules for the construction of vessels and other instruments of transportation, the regulation of the ingredients and physical properties of food, the prescription of commodity standards, and the regulation of competitive practices. The regulation of all of these matters bears upon economic enterprise and touches directly the financial aspects of great numbers of businesses affected, either by imposing direct costs or by limiting opportunities for gain. Appreciation of these effects, both by business men and government officials, seems to be the chief cause of the increased use of hearings in administrative rule making'.[23]

The type of hearing which is held in connection with the rule-making process is, in general, informal in nature. Such a hearing is analogous to a hearing before a legislative committee and bears no relation to a judicial proceeding. As such, there are normally no specific issues or rules of evidence or formalities of any kind except such as are necessary to assure order.[24] Such hearings 'are usually either investigatory or designed to permit persons who may not have been reached in a previous process of consultation and conference to come forward with evidence or opinion. The purpose is not to try a case, but to enlighten the administrative agency and to protect private interests against uninformed or unwise action'.[25]

Rule-making proceedings may, however, often assume an adversary character. The proposed rules may affect defined groups with

[21] Fuchs, *supra*, note 6, at 276.
[22] Report of the Attorney-General's Committee, 105.
[23] *Ib.*, at 107.
[24] Fuchs, *loc. cit.*, *supra*, note 21.
[25] Report of the Attorney-General's Committee, 108.

clearly competing interests, which stand to benefit or lose from their issue. 'Low-cost producers as against high-cost producers with respect to maximum prices or minimum wages; workers as against employers with respect to wages or working conditions; buyers as against sellers with respect to the regulation of agricultural marketing; the makers of machinery which will be barred by proposed safety regulations as against others whose product will be lawful; these are recurring divisions of interested parties which from time to time confront an administrative agency engaged in rule making'.[26] In such cases, the hearing on proposed rules may well take on a definite adversary character, more like a judicial than a legislative proceeding.

The use of the adversary hearing in American administrative rule making seems to have first crystallised in the procedure of the Interstate Commerce Commission.[27] Most of the hearings held by that body are treated as adversary in character and hence tend to be conducted along highly formal lines. Information at these hearings is introduced as evidence subject to refutation and often to cross-examination, and the whole procedure tends to take on the lawyer-like atmosphere of the court-room. Thus—to show what this type of procedure can mean in practice—in the course of hearings before the Commission on proposed safety regulations, a witness was offered who was duly identified and qualified at some length. Finally the witness was asked if he had any recommendations to make concerning the proposed regulations. In the transcript appears the following:

'A. We have a statement we would like to submit.

'Q. And is that statement in writing?

'A. It is.

'Commissioner—Do you offer this for the record?

'A. Yes; if the Commissioner please, if there is no objection, I would like to ask at this time that it be received as an exhibit.

'Commissioner—Any objection? [No response.]

'It will be received and marked as "Exhibit 13"'.[28]

This sort of thing went on throughout the hearing. 'Throughout the record are colloquies of counsel about admissibility of evidence, motions to strike statements from the record, objections to permitting a witness to state what he believes but does not know, and all that goes with the cumbersomeness and awkwardness of highly legalistic court-room proceedings. The continual "May it please the court" of an attorney in one proceeding blended with all the other trimmings'.[29]

This type of adversary procedure seems to be ill-adapted to the process of administrative rule making. 'One may question whether

[26] *Ibid.*
[27] Fuchs, *loc. cit.*, *supra*, note 24.
[28] Monograph, Part 11, 'Interstate Commerce Commission', 86.
[29] *Ib.*, at 87.

all these methods of the adversary, legalistic, courtlike proceedings are best adapted to serve the purpose of getting information, perfecting proposed regulations, and satisfying the parties that they have had opportunity to be heard '.[30] The tendency in some recent federal statutes has, however, been in the direction of requiring the adversary type of procedure in rule making. Under these statutes, the hearing which must be afforded prior to the promulgation of administrative rules and regulations is assimilated to that customarily required in connection with the exercise of judicial functions.

Thus, the Federal Food, Drug and Cosmetic Act of 1938, under which regulations fixing standards of identity for foods may be issued, requires the administrative agency concerned to ' hold a public hearing upon a proposal to issue, amend or repeal any regulation '. At the hearing ' any interested person may be heard '. The regulations as issued must be based ' only on substantial evidence of record at the hearing ', and the order promulgating them must include ' detailed findings of fact on which the order is based '. Under this, fact findings based upon the record similar to those required in quasi-judicial decisions must appear in the order in support of the administrative regulations. In addition, statutory review proceedings are authorised patterned after those which are normally provided for the review of administrative orders which are judicial in nature. Any person adversely affected by a regulation may secure its review on appeal to the Circuit Court of Appeals. On such review, the administrative findings of fact ' if supported by substantial evidence, shall be conclusive '—and the scope of review is similar to that available in the case of administrative adjudications.[31]

The rule-making procedure under statutes such as this is modelled upon the normal adversary type encountered in connection with adjudicatory action. ' Thus, such technical, widely-ramifying matters as standards of identity and quality for goods, the information to be conveyed by the labels on dietary products, the quantities of poisonous residue to be permitted in food products, and the habit-forming qualities of narcotic derivatives must be determined in the manner in which the conformity of a shipment of goods to specifications is tried in a law suit '.[32] The details of the hearings held under such statutory requirements are governed by the same methods and practice as those applicable in administrative adjudications. ' Technical motions, discussion of legal issues, questions of the relevancy and admissibility of evidence, the exercise of subpœna and other ancillary administrative powers, and the like, may be involved as in connection with

[30] *Ib.*, at 88.
[31] *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218 (1943).
[32] Fuchs, *supra*, note 6, at 279.

administrative adjudication '.[33] And the bases of the rule-making determinations must be articulated in a supporting record so that their substantiality may be tested by the reviewing court.

The types of hearing techniques which we have been discussing in connection with the rule-making process in America have no exact counterparts in the administrative practice in this country.[34] Consultation of interests specially affected is, it is true, relied upon to a very great extent by departments concerned in the promulgation of rules and regulations. But the practice here does not reach the hearing stage which has become so common in America. In this country, ' there is no general practice of public hearings. The consultation, though genuine, is without prescribed formalities '.[35] An evaluation of the efficacy of the American hearing procedures should consequently prove of value for students of delegated legislation here.

The chief value of the hearing technique lies in its ability to allow participation in the rule-making process by interests and individuals who might not otherwise be consulted, for anyone interested may appear at such hearings and express his views. In addition, the opportunity for public presentation of viewpoints and argument tends to afford to those affected a greater sense of taking part in the rule-making process than methods of informal consultation. The use of public hearings in connection with the promulgation of delegated legislation would thus seem to have a definite part to play in administrative procedure. This was, indeed, the conclusion of the United States Attorney-General's Committee on Administrative Procedure. ' The Committee believes that the practice of holding public hearings in the formulation of rules . . . should be continued and established as standard administrative practice, to be extended as circumstances warrant into new areas of rule making '.[36]

Our observations upon the usefulness of the hearing procedure in rule making do not, however, apply to the type of adversary hearing required under such statutes as the federal Food, Drug and Cosmetic Act of 1938. It is doubtful whether such adversary procedure is well adapted to the formulation of administrative regulations. ' The application of the procedures of a judicial trial to administrative rule-making is limited . . . by the distinctive characteristics of rule-making proceedings. The issues are normally complex and numerous; the parties may be diverse and not alignable into classes; the outcome will involve a judgment concerning the consequences of rules to be prescribed for the future and a discretion in devising measures to effectuate the policies of the statute. These factors differentiate these proceedings from the

[33] Commerce Clearing House, Administrative Procedure, (1944) 49.
[34] A basically similar purpose is, however, served by the Royal Commission technique here.
[35] Carr, *Concerning English Administrative Law*, 53.
[36] Report, 108.

normal judicial trial in which adversary hearings are traditionally employed and accordingly limit the possibility of defining issues, in advance of addressing evidence to them, of permitting systematic cross-examination, and of stating the findings and conclusions fully '.[37]

These remarks are borne out by the actual administrative experience under statutory requirements for such adversary hearings. The procedure in practice has been cumbersome and expensive. Reading the lengthy records in these cases one cannot help but be struck by the waste and delay caused by conformity to legalistic procedures appropriate to the court-room. These statutory procedures, superimposing as they do judicial characteristics upon what is essentially a legislative duty, tend to curb the administrative agency in the free utilisation of what might otherwise be considered more useful techniques of inquiry and fact gathering. As stated in a study on the use of such adversary procedures in the formulation of minimum wage orders under the federal Fair Labor Standards Act: 'Presumably, absent any statutory or judicial requirements, common sense would dictate a method entirely different from that now utilised; experts—both practical and theoretical—would study the industry, consult persons who might be in a position to throw light on the problems, and then arrive at the highest minimum wage which is "economically feasible". Such is the general approach utilised by the British minimum wage boards, as well as by similar boards in New York and other American States. It is improbable that, if one were permitted to start from scratch—with statutes and judicial thunderbolts aside—one would rely heavily upon an adjudicatory technique, patterned upon a court trial, as the best and most efficient method of gaining reliable information leading to a proper order of so clearly a legislative, unparticularised nature '.[38]

Procedure in administrative rule making, designed to secure participation by interests specially affected, such as the techniques we have been discussing, though perhaps the primary safeguard to ensure the proper exercise of powers of delegated legislation, remains largely an internal check. Legislatures may prescribe and courts attempt to enforce procedural requirements, but their effectiveness in practice depends largely upon the administrative agency itself. Thus, consultations of interests or hearings can be gone through as a matter of form, without any effect upon the delegated legislation as actually issued.

There are, however, other safeguards upon the exercise of powers of delegated legislation which are external of the administrative process. These are the checks imposed by the Legislature and Judiciary. In this country, parliamentary control over delegated

[37] *Ib.*, at 109.
[38] Monograph, Part 1, 'Administration of the Fair Labor Standards Act of 1938'. 40

legislation is exercised through the various forms of laying prescribed in enabling Acts. Through them, the Legislature is enabled, at least in theory, to exercise a continuing supervision over administrative rules and regulations. The methods of parliamentary control which have been developed on this side of the Atlantic have almost no American counterparts. This is largely due to the differing constitutional position of the Legislature in both countries. Control of administrative action in America is left more to the courts of law, and the Congress is not thought of as being responsible even for the limited supervision over delegated legislation that Parliament exercises.

Yet this is not to say that the American Legislature should not take a more active role in controlling administrative rule making. As Dean Landis points out, the English techniques have several virtues. 'For one thing, they bring the legislative into close and constant contact with the administrative'.[39] An M.P. who wishes to object to some regulation or order can do so directly on the floor of the House. The individual Congressman, on the other hand, can only place his objections before the administrative agency concerned. If the agency refuses to meet the objection, he can seek to bring indirect pressure against it; there is no direct machinery for congressional annulment of particular regulations analogous to the negative resolution technique in this country.

The English laying procedure has, indeed, not been unknown in American practice. One example which readily comes to mind is the Reorganisation Act of 1939, which, as its title implies, gave the President extensive powers to reorganise the executive branch of the Government by executive order. This measure passed only after bitter controversy and with the authority asked for by the President substantially cut down. The laying requirement was inserted as a check upon the power conferred; Presidential reorganisation orders were not to be operative for a stated period during which they could be nullified by the Congress. This provision did, in fact, enable some congressional control to be maintained over the power delegated, for the measure was a highly contentious one, and the legislative interest was thus sufficiently aroused to ensure adequate scrutiny of the orders which were laid.

This type of direct legislative control is, however, comparatively rare in America. Control by Congress over the administrative process tends rather to be indirect through the prescription of certain requirements to which administrative action must conform. Although many similar requirements have been prescribed by Parliament, the American practice here goes much further. The Administrative Procedure Act of 1946 is an attempt by the Congress to deal with the field as a whole and to prescribe certain minimum standards to which administrative procedure must conform. Most

[39] *The Administrative Process*, (1938) 77.

of the provisions of this Act deal with procedure in administrative adjudications, and hence do not concern us at this point. But a portion of the Act is devoted to administrative rule making and is relevant in a discussion of safeguards upon delegated legislation.

The safeguard of antecedent publicity, which we have already mentioned,[40] is among the requirements imposed by this statute. Another requirement along this line is that for deferring the effectiveness of all federal administrative regulations having statutory effect until thirty days after their publication. This is intended to assure that delegated legislation does not come into effect without the prior knowledge of those affected. ' Even the least significant statute must be formally introduced as a bill, printed, referred to a committee and reported on, often after hearing, read three times before each House, discussed in committee of the whole, and approved by the Executive. . . . Administrative rule-making is in striking contrast. The first knowledge that those affected have of a rule is usually after it has gone into effect. The first opportunity they have to challenge it is usually after it is enforced against them and they can attack it in the courts '.[41]

Closely connected with this is the whole problem of administrative publicity. The most important thing here, of course, is the adequate publication of the delegated legislation itself. For, ' it would be intolerable if it could be said that obscure clerks in Whitehall poured forth streams of departmental legislation which nobody had any means of knowing. This would be the method attributed to Caligula of writing his law in very small characters and hanging them up on high pillars " the more effectively to ensnare the people " '.[42]

A system of publication of delegated legislation has been in effect in America since 1935. The Federal Register Act of that year, whose provisions are largely modelled upon the system of publication of Statutory Rules and Orders in this country, provides for the publication daily in the Federal Register of all rules, regulations and orders of ' general applicability and legal effect '. At the end of each year, these are bound and indexed, and there is, in addition, the Code of Federal Regulations, which is a codification of these same documents.

Under the provisions of the Federal Register Act, it is expressly provided that no document required to be published under the Act ' shall be valid as against any person who has not had actual knowledge thereof ' until it has actually been filed for publication.[43] Some of the relevant enabling Acts, indeed, go even further. Thus, section 32 (2) of the Securities Exchange Act of

[40] *Supra*, pp. 453 ff.
[41] Pound, *Administrative Law*, (1942) 66.
[42] Mr. (now Sir) Cecil Carr, in Committee on Ministers' Powers, Minutes of Evidence, (1932) 208.
[43] Compare s. 2 (3) of the Statutory Instruments Act, 1946, in this country.

1934 provides that no person shall be subject to imprisonment under the section for the violation of any rule or regulation of which he can prove he had no knowledge. And accordingly, wide distribution and publicity attends the promulgation of rules and regulations of the Securities and Exchange Commission—the Commission practice here goes far beyond the requirements of the Federal Register Act. The Commission's policy and practice have been described by its General Counsel : ' In the field of rule making . . . publicity is a vitally important factor, both for the protection of the public affected and for the purpose of keeping the governmental agency in line with democratic principles. . . . On this theory the S.E.C. has not been content merely to meet the requirements of the Federal Register Act. It has a large duplicating unit which produces thousands of copies of releases every week, and a service section which keeps up-to-date lists of individuals, companies, and law firms who want to be kept on the mailing list for various types of releases. Anyone wishing his name to be placed on the mailing list need only tell us so, and he will receive the classification of releases he wants without charge. To illustrate : If the Commission adopts a new rule affecting trading in securities, it issues a release setting out the new rule . . .; it publishes the rule in the Federal Register; it sends out copies of the release—6,900 to registered brokers and dealers throughout the country, 2,400 to the people on "list 4" (people who have requested announcements of rules and interpretations under the Exchange Act), 1,200 to a general list of people who request copies of all releases, and 600 to the public press '.[44]

Finally, a word about the judicial control of delegated legislation. The function of the courts, here, broadly speaking, is to ensure that the authority exercised has not been broader than the terms of the delegation. The judicial power in this field is based upon the doctrine of *ultra vires*. The reviewing court is concerned not with the rule-making procedure (except where specific procedural requirements, such as the consultation of advisory committees or the holding of public hearings, are imposed by the enabling Act), but only with the question of whether or not the administrative sub-legislation was within the power conferred.

In America, as in this country, the doctrine of *ultra vires* furnishes the basis for judicial review in this field. The case usually cited to illustrate this is *Morrill* v. *Jones*,[45] where the relevant statute provided that ' Animals, alive, specially imported for breeding purposes, from beyond the seas, shall be admitted free (of duty) upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he may prescribe '. Among the regulations issued under this section was one which required the official concerned, before admitting such animals free,

[44] Quoted in Monograph, Part 13, ' Securities and Exchange Commission ', 107.
[45] 106 U.S. 466 (1883).

to be ' satisfied that the animals are of superior stock, adapted to improving the breed in the United States '. This, said the Court, was beyond the power of the Secretary. ' The Secretary of the Treasury cannot, by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case, we are entirely satisfied the regulation acted upon by the Collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of " superior stock ". This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit, duty free, all animals specially imported for breeding purposes. The Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation '.

The doctrine of *ultra vires* as applied to the validity of American delegated legislation is, however, broader than it is in this country. Not only must the regulation in question be *intra vires* the enabling Act, but both the Act and the regulation must be *intra vires* the Constitution. The courts must therefore first determine the constitutionality of the enabling Act; only after that has been decided can the question of the *vires* of the regulation be gone into. In determining the latter question, moreover, the American courts can invalidate administrative rules and regulations not only because they are *ultra vires* the enabling Act in the strict sense, but also because they are unreasonable. This is to be compared with the authority of the courts in this country over the sub-legislation of local authorities; ' unlike other delegated legislation by-laws made by subordinate bodies may be declared invalid not only because they are *ultra vires*, but also because they are unreasonable '.[46]

Under the American doctrine, it is for the courts to say whether or not there is a rational relationship between particular delegated legislation and the governing statute; ' rules and regulations must be reasonably appropriate and calculated to carry out the legislative purpose, and must be entirely within the power conferred '.[47] As stated by Mr. Justice Sutherland, ' The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but

[46] Wade and Phillips, *Constitutional Law* (3rd ed., 1946), 277. The judicial power here is limited by the doctrine of *Kruse* v. *Johnson*, [1898] 2 Q.B. 91.
[47] *Wallace* v. *Feehan*, 206 Ind. 522 (1934).

operates to create a rule out of harmony with the statute, is a mere nullity. And not only must a regulation, in order to be valid, be consistent with the statute, it must be reasonable '.[48]

Judicial review of the reasonableness of delegated legislation confers upon the reviewing court a much wider discretion and power of scrutiny than review limited to the question of *vires*. Thus, the court may have to go thoroughly into the factual background as well as the legal issues arising out of the exercise of the rule-making power. It is often only through an understanding of such background that the court can determine whether or not there is a reasonable relation between a challenged regulation and the relevant enabling Act. Thus, 'the relation between safety of operation and a regulation requiring power reverse gears on locomotives is obscure until it is revealed that a reverse gear serves not only to back the locomotive but also to check it when the train is going forward and that it acts in certain ways under certain conditions. Similarly, the relation between a required statement on the label of a food and the statutory evil of misbranding becomes clear only when it is learned what consumers in fact understand from a label which omits the statement '.[49] The reviewing court in such cases must examine into the facts in order to determine the reasonableness of a challenged regulation.

Yet it must not be thought that the American courts in making such determinations have thought it necessary to retrace the entire investigation and reasoning by which an administrative regulation was arrived at, and then to decide the issue of reasonableness in the abstract as a question to be determined *de novo* upon the independent judgment of the reviewing court. All that the court seeks is a judgment upon the rational relation of the regulation to the governing statute, and it gives much weight to the informed administrative judgment underlying such regulation. The test of reasonableness thus becomes one of arbitrariness—only where the challenged regulation is clearly arbitrary will the court refuse to uphold it. And a regulation is not unreasonable merely because the reviewing court thinks that it should not have been made.

The judicial attitude here is shown in an opinion by Mr. Justice Brandeis in a case dealing with the validity of certain standards for containers of horticultural products promulgated by a state administrative agency. 'Different types of commodities require different types of containers; and as to each commodity there may be reasonable difference of opinion as to the type best adapted to the protection of the public. Whether it was necessary in Oregon to provide a standard container for raspberries and strawberries; and, if so, whether that adopted should have been made mandatory,

[48] *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129 (1936). Compare the language of Scott, L.J., in *Sparks* v. *Edward Ash, Ltd.*, [1943] K.B. 223.

[49] Report of the Attorney-General's Committee, 116.

involve questions of fact and policy, the determination of which rests in the legislative branch of the state government. The determination may be made, if the constitution of the State permits, by a subordinate administrative body. With the wisdom of such a regulation we have, of course, no concern. We may inquire only whether it is arbitrary or capricious. That the requirement is not arbitrary or capricious seems clear. That the type of container prescribed by Oregon is an appropriate means for attaining appropriate ends cannot be doubted '.[50]

Bernard Schwartz.

[50] *Pacific States Box and Basket Co.* v. *White*, 296 U.S. 176 (1935).

STATUTES

THE FINANCE ACT, 1948

THE idea behind a general 'Capital Levy' upon an individual's assets has always been that the proceeds of the levy would so diminish governmental indebtedness that the consequential saving in interest on the National Debt would enable the rates of taxation to be considerably reduced and thus free money for productive enterprise, so particularly essential in the present critical state of our national economy. The late Lord Stamp showed up the fallacy of this idea in his *Current Problems of Finance and Government* (1923), where he estimated that, with the *then* rates of taxation and interest on public loans, a capital levy producing £3,000,000,000 would save £142,000,000 per annum on the National Debt against which, however, would have to be offset a loss of £70,000,000 per annum in income tax and supertax and £28,000,000 per annum in the yield of the death duties, then leaving a maximum net saving of some £50,000,000 per annum. Since then the rate of interest payable by the State on its major loans has fallen from five per cent. to three per cent. while taxation, in the highest income brackets, has risen from an aggregate of 11/- in the £ to 19/6 in the £, so that, at the present time, the probable *net* annual saving resultant from a capital levy of similar magnitude would be only a few million pounds per annum. When the almost insuperable administrative difficulties in assessing and levying such a tax are taken into account, it seems clear beyond peradventure that a capital levy of the normal type would result in a positive loss to the State, if measured in terms of *annual* saving of interest and loss of revenue.

The Finance Act, 1948, is particularly noteworthy for the 'Special Contribution' (Part V) which represents Sir Stafford Cripps' ingenious, and not unsuccessful, attempt to devise a form of capital levy—'once and for all'—which would not be open to the insuperable practical objections that put such a tax beyond the realm of practical politics after the first World War. Broadly speaking, the Special Contribution is charged upon all individuals liable to surtax for the year 1947–8—*i.e.*, whose total income from all sources exceeded £2,000—in respect of the excess over £250 of their 'investment income' for that year; the contribution is thus not leviable upon an individual's assets but only upon the fruit thereof and should normally be able to be paid out of income save in the case of those liable at the higher rates of surtax. The rates of contribution vary from 2/- in the £ for the first £250 of the *excess* of investment income over £250, to 10/- in the £ for

any excess of such income beyond £4,750; individuals not domiciled in this country are only chargeable to the contribution if they have been 'ordinarily resident' here throughout the ten years ending on April 5, 1948, while the contribution is not assessable at all in respect of any person who was not alive on that date. The contribution is to be assessed and charged by the Special Commissioners and is payable on January 1, 1949, interest at two per cent. per annum being allowed if paid before that date while interest at the same rate, but without deduction of tax, is exigible if the tax is not paid by the due date; the provisions of the Income Tax Acts relating to appeals and to 'cases stated' for the opinion of the High Court are made applicable.

The sections of Part V of the Act, relating to the Special Contribution, are often very involved so that only the more important require noting here. The expression 'investment income' covers all income other than 'earned income' (section 49), but does not include income from property owned and occupied by the contributor for the purposes of his trade, terminable annuities, retirement benefits nor income chargeable under Schedule B (section 50), *i.e.*, income from the occupation of land other than market gardens or farms over £100 annual value; income from a trust payable out of trust *capital* is similarly excluded (section 53), though such income is still includable in computing the contributor's total income from all sources, cf. *Trustees of John Morant Settlement* v. *I.R.C.*, [1948] 1 All E.R. 732, and Rule 21, All Schedules Rules, Income Tax Act, 1918. In arriving at the aggregate 'investment income' the same deductions for interest and other annual payments are permitted as are allowed for surtax purposes, but no deduction may be made for (maintenance) payments under an order of the court nor in pursuance of a disposition other than for full money's worth (section 52). Where chargeable 'investment income' arises under a trust, other than a 'foreign' trust, the contributor can recover a rateable proportion of the contribution he has borne from the trustees, who can be required to pay this proportion *direct* if the contributor so requests the Special Commissioners or the contribution is more than a month in arrear (section 56); in such cases the trustees are termed 'indirect contributors'; the trustees are given power to raise capital moneys to pay the contribution recoverable from them while the estate duty law relating to the cessor of a life interest is made applicable as regards the interests *inter se* of the beneficiaries of a trust which has so become liable (section 57). The other provisions in Part V are highly technical, but it may be noted that recovery may be made from a wife in respect of the portion of the contribution due to the aggregation of her investment income with that of her husband who is, as for income tax, made initially chargeable for both spouses (section 58). To meet the hardship that might arise in the case of director-controlled private companies where the

working directors obtain their remuneration partly as salary and partly as dividends, it is provided that dividends on the share capital of such companies shall not rank as 'investment income' except in so far as, together with the director's remuneration, they exceed a certain 'standard', normally £2,000 per director (Schedule X).

It is not proposed to consider the remaining Parts of the Finance Act in detail as this would be out of place in the pages of this *Review*, but the more interesting and important sections are briefly noted in the following paragraphs.

The apparently insatiable appetite of the public for 'smokes and drinks', despite a threefold increase in their price since 1939, enabled the Chancellor still further to increase the already unprecedently high duties on tobacco, beer and spirits (sections 1–4) while, in Part II of the Act, considerable variations were made in the rates of the Purchase Tax so as to fit in with the disinflationary aim of the Budget; stage plays and rural entertainments were relieved in whole, or in part, from the entertainments tax (sections 16–17) while the position of the dog-racing bookmaker was equated to that of the totalisators by the imposition upon him of a special graduated license duty (section 15).

In the realm of the income tax the wind was tempered to that oft-times shorn lamb—the middle class taxpayer—by the ceiling for the earned income relief being raised from £1,500 to £2,000, thereby covering the great bulk of the professional classes; at the same time the rate of relief was raised from one-sixth to the pre-war level of one-fifth while the amount of taxable income chargeable at two-thirds of the standard rate was increased from £75 to £200, so that a married man has to earn over £10 per week before he becomes chargeable upon any part of his earnings at the full standard rate of 9/– in the £. The Finance Acts of 1941 (sections 10–11) and 1942 (section 28) had seen the bulk of the farming community made chargeable under Schedule D upon their actual trading profits like any other trader, but these provisions had applied only to market garden land and to farms of over £100 annual value. The smaller farms were left chargeable upon a 'notional' profit—thrice the annual value—under Schedule B with the result that the large profits made, for example, from smallholdings where the rotation system was used for flowers, fruits and vegetables escaped taxation (cf. *Bomford* v. *Osborne*, [1942] A.C. 14), while occupiers of land which was not considered to be used mainly for the purposes of husbandry, *e.g.*, silver fox farming (*I.R.C.* v. *Melross* (1935), 19 Tax Cas. 607) practically escaped taxation as they were charged to tax on a mere one-third of the annual value of the land. In order to bring such profits fully within the ambit of the income tax, section 31 of the Act provides that all farming shall be regarded as a trade chargeable under Schedule D and that the occupation for any other purpose of land 'managed on a

commercial basis and with a view to the realisation of profits' is to be similarly treated as the carrying on of a trade.

Part IV of the Act—Income Tax (Expenses Allowances, etc.)—is aimed at the well-known 'expenses ramp' whereby employees are paid extravagantly high 'expenses allowances' which do not attract liability to tax under Schedule E although the concern paying them can claim such expenses as a deduction in computing its liability under Schedule D; in effect this is a means of paying remuneration 'free of tax' in the true sense of that term. The effect of Part IV is to make any sum paid in respect of expenses by a body corporate to its directors or senior employees a 'perquisite' of the recipient chargeable upon him under Rule 1 of Schedule E. The charge covers both the direct payment of expenses by the company and also any sums put by it at the disposal of the director, etc., and paid away by him. The expenses include payments on behalf of the director in respect of 'living or other accommodation, of entertainment, of domestic or other services or of other benefits or facilities of whatsoever nature' (section 39 (1)), while the term 'director', in effect, includes his spouse, family, servants, dependants or guests (section 45 (2)). A claim in respect of these expenses can be made by the director under the existing Rule 9 of Schedule E but the 'salary' element in these extravagantly high 'expenses allowances' will become chargeable to tax by reason of the very stringent wording of that rule—'money expended wholly exclusively and *necessarily* in performing the duties of the office, etc.' as even more restrictively applied by the courts, cf. *Ricketts* v. *Colquhoun*, [1926] A.C. 1; an abortive attempt by the Opposition during the Committee stage of the Bill to assimilate Rule 9, Schedule E, to Rule 3 (*a*), Cases 1 and 2, Schedule D, by deleting the word 'necessarily', is worthy of note. To save unnecessary complications both to the Revenue and the employer, power is given by section 42 to H.M. Inspector of Taxes to waive the operation of Part IV where he is satisfied that no additional tax would be payable if it were applied.

A. Farnsworth.

REPORTS OF COMMITTEES

COMMITTEE ON COUNTY COURT PROCEDURE: FIRST INTERIM REPORT (CMD. 7468/48)

THE first report of this Committee is directed to one of the main criticisms of all English courts—the extent to which litigants and their advisers and witnesses are kept waiting at the court for their cases to be heard. In many ways county court procedure is in advance of that of the High Court since in the majority of cases a definite date is fixed for the hearing when the summons is issued, but unhappily, it may prove necessary to wait the greater part of the day before the case is reached and in some cases it may not be reached at all or may be part heard at the end of the day. In such cases it will almost certainly not be possible to commence or continue the hearing next day and it will have to stand adjourned possibly for some considerable time.

The Committee consider that the risk of adjournments for want of time cannot be entirely eliminated, but they make a number of valuable suggestions designed to reduce the adjournments to the minimum. In the main these suggestions are based on the practice already adopted in the best-run county courts; the principal additional recommendations are for increased liaison between litigants and practitioners and the courts, and for a review of the list during the week before the hearing day.

It may also be noted here that as a result of the evidence given before the corresponding Evershed Committee on Supreme Court Procedure the experimental introduction of the practice of fixing days on county court lines is next term to be introduced in witness actions in the Chancery Division (Practice Direction, July 7, 1948). All practitioners will wish this experiment well; if successful and extended throughout the High Court, it may remove one of the worst blots on our legal system. As the County Court Committee point out, the problem in the High Court is to some extent easier of solution since it may there be possible to switch cases from one judge to another if the latter's list has collapsed. In any event, no great harm is done if a judge occasionally finds himself with time on his hands, provided that this does not become so general as to result in increased delays all round, and there are other ways of avoiding this—shortening the Long Vacation being perhaps the most obvious.

Note.

The summary of recent periodical literature will be held over until the next number of the *Review*.

NOTES OF CASES

MATRIMONIAL CAUSES

Grimes v. *Grimes*, [1948] 2 All E.R. 147.
White v. *White*, [1948] 2 All E.R. 151.

It is hazardous to attempt to prophesy the future trend of decisions in matrimonial cases. In a letter published at p. 70 of this Review Mr. Latey courageously denied the existence of the distinction between void and voidable marriages, only to be contradicted by the Court of Appeal in *de Reneville* v. *de Reneville*, [1948] P. 100, before his letter had even appeared in print. In an article at p. 176, above, the present writer ventured on what appeared to be the comparatively safe statement that, in the light of *Baxter* v. *Baxter*, [1948] A.C. 274, there would be little chance of arguing successfully that the practice of *coitus interruptus* prevents consummation of the marriage. No sooner had this opinion been expressed than the contrary view was taken by Finnemore, J., in *Grimes* v. *Grimes*. This, however, was an undefended case and the next day Willmer, J., in the defended case of *White* v. *White* refused to follow it and not only refused to grant a decree of nullity, but also adopted the writer's view that a wilful refusal of intercourse might be cruelty and granted a decree of divorce on this ground.

The latter decision seems clearly to be preferred on both points but obviously they will have to go higher.

Squire v. *Squire*, [1948] 2 All E.R. 51.

The decision of the judge of first instance in this case ([1947] 2 All E.R. 529) was severely criticised by Mr. Samson at p. 88 above, and happily his opinion has now been adopted by the Court of Appeal. The facts and arguments on the important point raised are fully canvassed in the previous note and it is sufficient to say that the court has now rejected the view that malicious intent is an essential element of cruelty, and that the general principle applies that a person is presumed to intend the natural and probable consequences of his acts and may, therefore, be legally guilty of cruelty notwithstanding that his conduct was the consequence of illness and not of mere spite.

Kara v. *Kara*, [1948] 2 All E.R. 16.

The main question for decision in this case was the effect of section 6 (2) of the Matrimonial Causes Act, 1937, which provides that

on a petition for divorce the court may treat a separation or maintenance order ' as sufficient proof of the adultery, desertion, or other ground on which it was granted, but . . . shall not pronounce a decree of divorce without receiving evidence from the petitioner '. The decision in *Harriman* v. *Harriman*, [1909] P. 123, makes it clear that the magistrates' decision does not create an estoppel but it was argued that the effect of s. 6 (2) was to compel the court to follow their decision on the main issue and to limit the need for the petitioner's evidence to disproving the absolute and discretionary bars. The Court of Appeal rejected this argument and held that the petitioner must give evidence on the main issue also and that unless satisfied on this a decree must be refused, notwithstanding the finding of the magistrates. The contrary decision would have been to substitute ' *must* accept as *conclusive* proof ' for ' *may* accept as *sufficient* proof '.

Fearn v. *Fearn*, [1948] 1 All E.R. 459.
Wilmot v. *Wilmot*, [1948] 2 All E.R. 123.

These two interesting decisions on condonation illustrate that it involves something more than forgiveness. In the first case the husband, while serving overseas, learnt of his wife's adultery and wrote forgiving her. Later further information reached him and he then stopped her Army allowances and brought divorce proceedings. The Court of Appeal, overruling the trial judge, held that there had been no condonation. The essential element of condonation was not the conditional forgiveness or waiver of the offence, but either a restoration of the erring wife to her former position or other conduct calculated seriously to prejudice her position. Here there had been neither; the wife had not been removed from her position and therefore there could be no question of her being restored to it, nor had she been prejudiced in any way. There was really nothing more than words of forgiveness which alone can never constitute condonation.

This decision was distinguished in *Wilmot* v. *Wilmot*. There the parties had been estranged for many years, and although they continued to live together they rarely spoke and had no marital intercourse. Eventually the wife confessed to adultery, but for a further six months they continued to live as before. Then the husband left and commenced divorce proceedings. To the wife's plea of condonation, he naturally relied strongly on the dictum in *Fearn* v. *Fearn*, that condonation involved re-instatement and that re-instatement could only take place after displacement. He argued that the wife had never been displaced from the position which she previously held and consequently had not and could not have been restored to it. Willmer, J., rejected this argument which, as he pointed out, would have had the startling effect of making a delayed forgiveness and restoration condonation but not an immediate forgiveness and continuation of the existing cohabitation.

He said (at p. 125): 'The displacement . . . may be merely a notional displacement, and it may be immediately made good by condonation or re-instatement on the part of the husband'.

It is submitted that this doctrine of *notional displacement* is unfortunate and unnecessary, and that the distinction between this case and *Fearn* v. *Fearn* is that in the latter the injured husband had no opportunity of displacing the guilty wife from her former position, whereas in the present case he had and failed to exercise it. In other words, to constitute condonation there must either be a displacement followed by a re-instatement, or a continuation of an existing state of cohabitation in circumstances showing a clear election not to displace it as a result of the adultery. Where there has been no cohabitation before the discovery of the adultery, it seems that there cannot be condonation until cohabitation commences or the innocent party does some other act unequivocally waiving the offence and calculated seriously to prejudice the other's position. In *Wilmot* v. *Wilmot* it was argued that the parties were not cohabiting, but it seems clear that for legal purposes they were, and so the judge undoubtedly thought although he stated that it was unnecessary to decide the point. It is suggested that in reality a decision on this point was necessary. If the parties were not cohabiting, then the case seems to have been on all fours with *Fearn* v. *Fearn*, and on the authority of that case it is difficult to see how a continuation of that state of non-cohabitation, even though coupled with words of forgiveness, could be condonation. The only logical basis for the decision on this part of the case seems to be that the husband allowed a state of cohabitation to continue after he had had an opportunity of deciding whether to break it.

The other argument raised by the husband in *Wilmot* v. *Wilmot* was the ingenious one that just as it takes two to make a quarrel so it takes two to make a condonation. It was urged that although the husband desired a reconciliation, the wife always refused and thus rejected the offered condonation. It is hardly surprising that the learned judge rejected this argument also. Condonation, unlike collusion, is not founded on agreement between the parties but on the conduct of the innocent party; it is a unilateral waiver not a bilateral contract, and the absence of consent of the guilty party to the waiver is irrelevant.

Evans v. *Evans*, [1947] 2 All E.R. 656.
Thomas v. *Thomas*, [1948] 2 All E.R. 98.

These two cases complement each other and the former illustrates the extent to which changing social conditions may make nonsense of what was originally a sound legal rule. It also illustrates how the courts' methods of construing statute law may aggravate the position.

Prior to the Summary Jurisdiction (Separation and Maintenance) Act, 1925, it was a condition precedent to an application by

a married woman for a separation or maintenance order that she should have ceased to live with her husband. This caused hardship since she might not be in a position to leave until provision had been made for her maintenance. Hence section 1 (1) enables her, notwithstanding that she has not yet left him, to apply for an order, but subsection (4) provides that it shall not be enforceable ' while she resides with her husband ' and shall cease to have effect if she continues to reside with him for three months. In 1925 this provision doubtless worked fairly. There was no serious housing shortage, and the maintenance which she could be awarded might well have enabled her to pay for separate accommodation. Today the situation is very different. Accommodation, except perhaps in hotels, is unobtainable and one cannot live in an hotel on £2 per week. What, in these circumstances is the wife to do? She may have grounds for a separation order, but this does not, as many laymen think, enable her to turn her husband out of the home if it is in his name—maybe it would be fairer if it did. True, she is not precluded from obtaining an order, although they continue to live together, but the order will be of no use to her until they part. She therefore has to go, or grin and bear it, and it may be impossible for her to find anywhere to go. The result is that the primary question today when advising poor persons is not (as it should be): Who is at fault? but: Who owns the matrimonial home? Only if one's applicant is in that fortunate position, may it be practical to advise resort to the police courts.

To some extent the effect of modern housing conditions has been recognised by the courts which have held in a number of divorce cases (*e.g.*, *Wanbon* v. *Wanbon*, [1946] 1 All E.R. 366; *Angel* v. *Angel*, [1946] 1 All E.R. 635) that a state of desertion *may* exist notwithstanding that the parties are living under the same roof. In *Evans* v. *Evans*, it was argued that the same rule should apply under section 1 (4), and that, as the parties were living in separate parts of the house and performing no services to each other (so that there was no cohabitation within the meaning of the cases on desertion), the wife was not ' residing with ' her husband and could enforce a maintenance order against him. The Divisional Court (by a majority) held otherwise. They considered that *residing* was not the same as *cohabiting* and that although the wife was not cohabiting with the husband, she was nevertheless residing with him and therefore could not enforce the order. The grave hardship was admitted, and one might have thought that the court would not have come to such a socially undesirable decision unless constrained to do so by clear authority or the unambiguous words of the statute. In fact, however, the decision seems to have been based solely on a comparison with the wording of section 2 (2) of the Act. This provides that: ' Where a married woman . . . resumes cohabitation with her husband after living apart from him . . . the order shall cease to have effect on the resumption of such

cohabitation '. The court argued that the Legislature was deliberately drawing a distinction between *cohabitation* on the one hand and *residing with* or *living with* on the other and that what was relevant for the purposes of section 1 (4) was residence which meant something different from cohabitation.

Arguments based on an assumption of logical precision of draftsmanship are notoriously unreliable and have frequently been so described by the courts; as Blackburn, J., pointed out in *Hadley* v. *Perks*, L.R. 1 Q.B. 444, at p. 457, sometimes the purpose of varying the language seems merely to have been ' to improve the graces of style and to avoid using the same words over and over again '. It is submitted that there is strong internal evidence that this is such an example. In section 2 (2) the draftsman seems to be assuming that *cohabitation* is the opposite state to *living or residing apart* and that *cohabiting* is synonymous with *living or residing with*; he merely varied the language to improve the graces of style. Moreover, to adopt the court's construction appears to be to attribute an excessive decree of inanity to the Legislature. We are asked to assume that the Legislature decided as a matter of policy that an order should not be enforceable while the parties continued to reside together even although not cohabiting. Having so decided, would any sane man then decide that the order, having become enforceable, should continue enforceable notwithstanding that they were living together again provided that they were not actually cohabiting? Yet this is the effect of the court's decision, as is clearly shown by the later case of *Thomas* v. *Thomas*, where the parties were residing together after parting but not actually cohabiting and the court held that the order continued in force.

What makes the position even more absurd is that the court in *Evans* v. *Evans* would apparently have come to an opposite conclusion had the parties been living in the house of a third party (see *Watson* v. *Tuckwell*, unreported, but discussed in the *Evans Case* at p. 657). It is hard to understand why residence should depend on the legal ownership of the house, but the court seem to have been impressed with the argument that had *Watson* v. *Tuckwell* been decided otherwise, it might have followed that the parties would have to be treated as residing together if they happened to be occupying separate rooms in the same hotel. This, however, appears to be a *non sequitur* because in the hotel example they would not be sharing a dwelling-house at all, whereas in *Watson* v. *Tuckwell* they apparently were.

The dissenting judge (Croom-Johnson, J.) apparently concurred in the majority's construction of the statute, but would have refused to interfere with the magistrates' decision on the ground that whether the parties were residing with each other was a pure question of fact. The majority, on the other hand, thought that it was not a question of fact at all, but ' one of pure legal construction ' (*per* Humphreys, J., at p. 658). The case is therefore

another example of the inconsistent attitude of the courts in deciding what are questions of fact and what questions of law. For income tax purposes it is firmly established that residence is a pure question of fact and not of legal construction (see *I.R.C.* v. *Lysaght*, [1928] A.C. 234, and Farnsworth, '*Fact*' *or* '*Law*' *in Income Tax Cases*, 63 L.Q.R. 155). It is true that the House of Lords in the *Lysaght Case* stated that the position might be different in other branches of the law where *residence* was used in a special or technical sense, but in the case under discussion the court expressly denied that *resides with* was used in any special sense, and, as in the income tax cases, declared that it had to be given 'its ordinary meaning'.

It is therefore submitted that the decision in *Evans* v. *Evans* is both socially and legally indefensible. In *Thomas* v. *Thomas* the Divisional Court very justly praised the magistrates for the skill with which they had picked their way through this maze of legal subtleties. One wonders whether the lay magistrates would have reciprocated the Law's expressions of esteem or whether they would not rather have shared the opinion of Mr. Bumble.

L. C. B. G.

'UNFIT FOR HUMAN HABITATION'

Some of the most important remedial provisions of the Housing Acts are contingent upon a finding that a house is 'in any respect unfit (or not reasonably fit) for human habitation'. The meaning of this phrase has been judicially considered in a long line of cases (see J. Unger in (1942) 5 Mod.L.Rev. 266–71), which show a gradual progression from a narrow interpretation to a more liberal outlook by the courts. The present state of the law is thought to be represented by Atkin, L.J.'s dictum in *Morgan* v. *Liverpool Corporation*, [1927] 2 K.B. 131, 145: 'If the state of repair of a house is such that by ordinary user damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation'. Thus, in *Summers* v. *Salford Corporation*, [1943] A.C. 283, the House of Lords held that a broken sash-cord rendered a working-class house unfit for human habitation, since it prevented the opening of the only window in one of the two bedrooms. Possibly encouraged by this trend of interpretation, the local authority in *Daly* v. *Elstree R.D.C.*, [1948] 2 All E.R. 13, contended that a cottage was unfit for human habitation because its hot-water system was out of order. It is hardly surprising that the Court of Appeal refused to accept such an argument, particularly as the cottage had running water and a gas cooker on which water could be heated. The local authority relied on section 188 (4) of the Housing Act, 1936, which

provides that in determining whether a house is fit for human habitation, 'regard shall be had to the extent, if any, to which by reason of disrepair or sanitary defects the house falls short of . . . the general standard of housing accommodation for working classes in the district'. Here three-quarters of the working-class houses in the district had hot-water systems. But, as Asquith, L.J., pointed out, the courts were not bound to have *exclusive* regard to the general local standard; nor did it follow that because a house fell below that standard it was therefore unfit for human habitation.

This case is of interest in that it illustrates the limitations of the judicial function. Social legislation demands a creative interpretation, but it is not for the courts to evolve standards which were not within the contemplation of the legislature and which are incompatible with the present-day meaning of the words used in the Act.

S. A. de Smith.

'EQUITY WILL NOT ALLOW A STATUTE TO BE USED TO FURTHER A FRAUD'

The decision of the Court of Appeal in *Bannister* v. *Bannister*, [1948] 2 All E.R. 133, raises in a neat form the well-known maxim, 'Equity will not allow a Statute to be used to further a fraud'. A widow sold a pair of cottages worth upwards of £400 to the plaintiff for £250, and the latter orally agreed to allow the widow to live in one of the cottages during her life. For a few years after the conveyance which was absolute in its terms and made no mention of the oral agreement, the widow occupied part of one cottage. There was no evidence that the plaintiff had acted fraudulently, however. But eventually he sued to recover possession of the cottage, relying on the conveyance to prove an absolute title; whence arose this appeal. For at law the widow's interest, not being protected by writing, has the force and effect of an interest at will only (Law of Property Act, 1925, ss. 53, 54). But here Equity steps in and enforces the oral undertaking, since it was given for value and it would be fraudulent of the grantor not to honour it. So the widow has a life interest, and the cottage becomes Settled Land. Nothing new is brought up in this case, but it is worth noting that the fraud which must be present before Equity will 'overrule' the Statute need not have consisted of a fraudulent intent at the time of creating the interest in dispute. The fraud arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest. This case is on all fours with *Booth* v. *Turle* (1873), L.R. 16 Eq. 182, which was approved in *Rochefoucald* v. *Boustead*, [1897] 1 Ch. 196. No doubt it will displace the latter as the text-book writer's favourite illustration of the maxim.

D. C. Potter.

CAN THE DOCTRINE OF FRUSTRATION APPLY TO LEASES?

Decisions of the Court of Appeal form binding precedents, even where an appeal from the decision went to the House of Lords and their lordships, while dismissing the appeal on different grounds, expressly disapproved the reasons given by the lower court. This unsatisfactory principle is apparently the *ratio decidendi* in the judgment of Tucker, L.J., in the recent case of *Denman* v. *Brise*, [1948] 2 All E.R. 141. The argument of counsel had been that a certain lease had been terminated by frustration. Now it will be remembered that there is some disagreement as to the application of the doctrine of frustration to leases, and that it has never been expressly decided whether the doctrine is capable of being invoked in case of a lease or not, except in the case of *Leighton's Investment Trust, Ltd.* v. *Cricklewood Property and Investment Trust, Ltd.*, [1943] K.B. 493; [1945] A.C. 221. The Court of Appeal in the present case in 1948 consider themselves bound by the decision of the Court of Appeal in that case in 1943. In that decision MacKinnon, L.J., said:

'The doctrine of frustration . . . has been applied to a variety of contracts; but it has never been applied to a demise of real property. Indeed there is clear authority that it cannot.'

This is the statement of the law which the present Court of Appeal consider binding. But the fact is, when that case went to the House of Lords on appeal, only Lords Goddard and Russell of Killowen supported this view; while Lords Simon, Wright and Porter based their judgments on somewhat different grounds. Lord Simon indeed went so far as to review the authorities, and pointed out that the remarks of judges on the point have been purely obiter. In these circumstances it seems to be incongruous that the earlier decision of the Court of Appeal should be entitled to be treated as binding. Nevertheless in the present case that decision has been followed for this reason. It is a little difficult to see why the doctrine of frustration should never apply to leases. If I sell you a thousand gallons of oil, but the oil is requisitioned before delivery, the doctrine of frustration operates to terminate liability; why should it not also operate, where I demise an oil-well containing a thousand gallons, and the well is requisitioned? If I demise my theatre to you for five years, but it is destroyed at the end of one year, why should not the doctrine of frustration apply as much as if I only grant you a licence to use my theatre for five years? The facts in the present case were as follows: a monthly tenant quit a house when it was bombed in 1940, but never gave or received notice to terminate the lease. Now that the house has been rebuilt, the tenant claims possession under the lease. Both of the landlord's defences have been rejected by the Court of Appeal; the first defence rested in frustration, as we have seen; the second was that the tenant had, by losing all

interest in the bombed ruins between 1940 and 1948, abandoned or surrendered the lease. On this second point the judgment is not very helpful, for while ruling that there is no evidence of surrender by the tenant, it does not inform us either what would amount to an implied surrender, or how the tenant behaved toward the landlord during the bombed period; whether, for instance, rent was paid.

D. C. Potter.

CONFISCATORY LEGISLATION AND SHARE CERTIFICATES

Kahler v. *Midland Bank, Ltd.*, [1948] 1 All E.R. 811, is a decision of the Court of Appeal which will cause no little surprise. The plaintiff was the undisputed owner of certain share certificates endorsed in blank which were held by the defendants in a dossier for a Czechoslovak Bank described as the Bohemian Bank with whom the plaintiff had an account; neither the defendants nor the Bohemian Bank claimed any right, title or interest in the shares. By his writ issued in July, 1939, the plaintiff, who had by that time left Czechoslovakia, claimed from the defendants delivery up of the shares. He relied on an alleged direct contractual relationship between himself and the defendants, but this point, which, on the facts as reported, obviously was a bad one, is of no general interest. The remarkable aspect of the case is that the plaintiff failed with his claim *in rem* on the ground that Czech currency regulations precluded the release of the securities to him. If the case had been decided (as it must be deemed to have been) at the date of the issue of the writ, Hitler would not only have received a handsome addition to his resources of foreign exchange, but would also unexpectedly have been supplied with an effective weapon in innumerable similar cases which at that time were pending in the English courts and which no defendant allowed to proceed to trial, because they were thought to be indefensible.

According to Evershed, L.J., who delivered the leading judgment, the plaintiff was required to prove ' not merely that he is absolutely entitled beneficially to the shares, but also that he is entitled to possession of the certificates. Put another way, the plaintiff must . . . show, if the consent of the Bohemian Bank is necessary to his possession of the certificates (as it is, since the defendants hold them for the account of that bank), either that the Bohemian Bank is bound to give such consent or that the absence of such consent may, on the facts of the case, be disregarded in an English Court ' (p. 818). It is submitted with great respect that this is an erroneous approach to the problem, for the Bohemian Bank's consent to the release was not necessary at all. It is settled law that a bailee can never be in a better position than the bailor and that, consequently, in the absence of any right or title or lien on the part of the bailor, he must deliver the goods deposited with him

to the true owner, irrespective of whether or no the bailor consents : *Wilson* v. *Anderton* (1830), 1 B. & Ad. 450; *Wetherman* v. *London and Liverpool Bank of Commerce, Ltd.* (1914), 31 T.L.R. 20. The real question, therefore, was not whether the Bohemian Bank's consent was necessary, but whether the Bohemian Bank had such right or title or interest as could be set up by the defendants for the purpose of resisting the plaintiff's claim.

The defendants did not even allege such a right on the part of their bailor. All they said was that, if and in so far as the plaintiff required delivery of the shares outside Czechoslovakia, Czech law made it incumbent upon the Bohemian Bank to obtain the consent of the Czech Government, a complete stranger which in no sense exercised the functions of a head-bailor. The Bohemian Bank itself could not refuse delivery up. It was the Czech Government which, through the instrumentality of the Bohemian Bank, desired to make the plaintiff's possession dependent upon its own consent. This is made abundantly clear by Scott, L.J. : ' In the result, the Czech Government may be regarded in two capacities, either of which defeats the plaintiff's claim. The first is that the Bohemian Bank . . . cannot give the necessary consent because it would be breaking the law of Czechoslovakia if it did. The second is that the Czech Government has by its legislation conferred on itself in regard to possession of the shares a title paramount to the title of the plaintiff as owner ' (p. 821).

In truth and in fact, by upholding the defendants' plea, the Court of Appeal allowed the Czech Government to effect a confiscation of property situate in this country. It is one of the puzzling features of this case that the court seems to have been unaware of this consequence although Scott, L.J., was a party to the recent decision in *A/S Tallina Laevauhisus* v. *Estonian State S.S. Line* (1947) 80 Ll.L.R. 99, 111, which re-affirmed the principle of the territorial limitation of confiscatory legislation. Although Scott, L.J., speaks of the Czech Government's title paramount, it did not, of course, even purport to acquire the actual property in or possession of the shares situate in England. Confiscation, however, does not pre-suppose any such acquisition. The Czech legislation constitutes such encroachment and fetter upon the owner's rights in England that its confiscatory character cannot be denied, particularly if it is remembered that in these matters (to adopt a famous phrase of Mr. Justice Black of the United States Supreme Court) no device, however ingenious or ingenuous, should be permitted to obscure the reality of the situation. Lord Ellenborough's definition of confiscation in *Levin* v. *Allnutt* (1812), 15 East 269, is sufficiently wide to include numerous measures adopted for the purpose of exchange control and involving in law, though not in fact, something less than the appropriation of property or the right to possession : see, generally, Mann, *The Legal Aspect of Money* (1938), pp. 267, 268, and compare *Bohm* v. *Czerny*,

[1940] *The Times* Newspaper, July 26; *Frankfurther* v. *W. L. Exner, Ltd.*, [1947] Ch. 629. If the plaintiff had maintained the account with the defendants in his own name and if Czech law had provided (as many laws do provide) that an emigrant in the plaintiff's position cannot, even after his emigration, dispose of foreign assets without the Czech Government's consent, the confiscatory character of such legislation would have become obvious and Czech law would surely not have been allowed to block property situate in England. The interposition of the Bohemian Bank has obscured the facts, but should not make any difference in law. The Bretton Woods Agreement Order, 1946 (made seven years after the issue of the writ) which the defendants invoked does not affect the issue. It invalidates certain contracts involving the currency of a member State, but has no bearing upon the plaintiff's claim *in rem*; since Art. XVIII of the Bretton Woods Agreement only deals with questions of interpretation arising between member States and, moreover, was not incorporated into the law of England by the Order in Council, there was no reason why Evershed, L.J., should have thought it 'undesirable' to express a view.

F. A. Mann.

'OTHER CONCERNS OF THE LIKE NATURE'

The decision of the House of Lords in *Russell* v. *Scott*, [1948] 2 All E.R. 1, is of more than ordinary interest beyond the mere technical issues involved for it not only stressed the importance of the historical continuity of our income tax legislation and was, besides, an interesting example of the *ejusdem generis* rule but it also pointed the moral of that somewhat trite maxim of income tax law, namely, 'the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax'.

The case turned upon the meaning of an expression '*other concerns of the like nature* having profits from or arising out of any lands . . .' which made its first appearance nearly one hundred and fifty years ago in the Income Tax Act, 1806 (s. 74, Schedule A, No. III, r. 6) in conjunction with certain other concerns about land, *viz.*, 'Ironworks, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains and levels, fishings, rights of markets and fairs, tolls, ways, bridges, ferries and *other concerns* . . .'; all these concerns were charged in respect of the actual profits made and not upon the conventional rack-rent. This catalogue of most disparate concerns was reproduced *verbatim*, with the addition of railways and gasworks, in the Income Tax Act, 1842 (s. 60, Schedule A, No. III, r. 3) and repeated in identical language in the present governing statute, the Income Tax Act, 1918, Schedule A, No. III, r. 3.

The question for decision in *Russell* v. *Scott* was whether a sand pit was an 'other concern of the like nature' to those concerns expressly enumerated in the present Schedule A, No. III, r. 3. The Special Commissioners had found that the sales of sand had been made by way of trade and constituted a series of transactions carried out in pursuance of a regular method; they, therefore, found that the sand pit was 'of the like nature' to the enumerated concerns, basing themselves on the comparable case of *Mosley* v. *Geo. Wimpey & Co., Ltd.*, [1945] 1 All E.R. 667 (C.A.) where it had been held that a gravel pit was an 'other concern of the like nature' and, therefore, chargeable under Schedule A, No. III, r. 3, upon the actual profits made.

The Law Lords had no doubt that the sand pit in the instant case had been properly held to be a 'concern' for the amount of business organisation involved, *viz.*, a regular system of direction and management, was adequate for the purpose of selling the sand —clearly the degree of organisation needed for a toll would be vastly less than for, say, an ironworks; since a 'question of degree' was involved, the issue on this point was one of 'fact' within the sole purview of the Appeal Commissioners.

On the point of 'law', namely whether the sand pit was a 'concern of the like nature', the Law Lords found, however, in favour of the taxpayer. The issue here was an interesting application of the *ejusdem generis* rule for the Crown contended that Schedule A, No. III was meant to cover all 'extraordinary' use of land, *i.e.*, the intensive exploitation of the surface or subsoil by which *varying* profits were derived, as contrasted with the 'normal' use of land as for agriculture, forestry, or buildings; the exploitation of a sand pit was just such an abnormal use of land so that sand pits were properly included in the expression 'other concerns of the like nature', since this was the only place available for them in Schedule A, No. III. For the taxpayer it was argued firstly that a sand pit was totally unlike any of the expressly enumerated concerns and secondly, that with the exception of alum mines, none of these concerns involved the abstraction of the soil but merely its special use so that the *ejusdem generis* rule could not operate to include sand pits within the term 'other concerns, etc.'.

In rejecting the Crown's contention, the Law Lords pointedly remarked that the whole of Schedule A, No. III (rr. 1 and 2 of No. III deal with the profits of mines and quarries respectively) was an exception to the General Rule No. 1, Schedule A, which charges, upon the rack-rental value, 'all lands, tenements, hereditaments and heritages, capable of actual occupation and for whatever purpose occupied or enjoyed (*except* the properties mentioned in No. II and No. III of this Schedule'; since sand pits were not expressly referred to in the very heterogeneous collection of properties specially named in No. III, r. 3, it would be an unjustifiable extension of general words in an exception to bring

them under so vague a term as ' other concerns of the like nature '. Moreover, as Lord Simonds remarked, during the whole of the 150 years r. 3 had been in force (cf. Income Tax Act, 1806, s. 74) ' there had been no more familiar feature of the landscape than pits of sand or gravel or clay '; had the Legislature intended to tax the profits from sand pits under Schedule A, No. III, it would surely have expressly mentioned them therein instead of leaving their inclusion to be deduced from so uncertain an expression as ' other concerns of the like nature ', especially having regard to such rare modes of exploiting lands as mundic or alum mines, both specifically mentioned in No. III. The decision of the Court of Appeal in *Mosley* v. *Geo. Wimpey & Co., Ltd.*, [1945] 1 All E.R. 667, cf. *supra*, was, of necessity, overruled.

The language of No. III, r. 3, was so obscure and its construction with reference to the subject of the instant appeal so difficult to expound that both Lords Simonds and Oaksey considered that this was a suitable occasion for reiterating that somewhat over-stressed maxim of income tax law : ' The subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him '. Although the Law Lords held that sand pits were not chargeable under Schedule A, No. III, r. 3, either for the reasons set out above or because they were totally unlike any single one of the concerns expressly enumerated therein, they unfortunately refrained from attempting to lay down any principle which would delimit just what type of property could be regarded as an ' other concern of the like nature ', so that both the Revenue and the taxpayer are left without guidance for the future and each case will have to be litigated in the courts upon its own special facts.

A. Farnsworth.

THE INTERNATIONAL COURT OF JUSTICE

i. The Jurisdiction of the International Court

The first judgment of the International Court of Justice was delivered upon the Preliminary Objection raised by Albania to the Application filed by the United Kingdom instituting proceedings before that Court with reference to the incidents of October and November, 1946, in the Corfu Channel (*Corfu Channel Case, Judgment on Preliminary Objection;* I.C.J. Reports 1948, p. 15).

The British Application was made as a result of a resolution of the Security Council recommending the two Governments to refer the matter to the International Court of Justice. The United Kingdom asked the Court to declare that Albania was internationally responsible for what had occurred, and alleged that by Article 25 of the Charter—by which Members of the United Nations and States, among whose number was Albania, accepting the

obligations of membership for a particular issue agreed to be bound by decisions of the Security Council—Albania was bound to comply with this recommendation and submit to the jurisdiction of the Court.

The judgment of March 25, 1948, did not deal with the merits of the case but merely with the Albanian objection.

In a letter to the Court dated July 2, 1947, Albania contended that, since international judicial settlement depends upon consent, compulsory jurisdiction exists only in respect of those States which make a declaration in accordance with Article 36—the 'Optional Clause'—of the Statute of the Court. As Albania had made no such declaration she contended that Great Britain could not proceed by way of unilateral application. Secondly, it was contended that Article 25 could not apply to a recommendation of the Security Council made with reference to the pacific settlement of disputes. This Article, Albania alleged, applied only to enforcement measures under Part VII of the Charter and could not be used in an attempt to create an indirect basis for compulsory jurisdicton. In view of the above, the Albanians argued that the United Kingdom should, in order to comply with the Resolution, have reached an understanding with Albania regarding the conditions under which the issue should be submitted to the Court.

In this letter Albania reiterated its acceptance of the Security Council's recommendation and declared that 'profoundly convinced of the justice of its case . . . it is prepared, notwithstanding (the) irregularity in the action taken by the Government of the United Kingdom, to appear before the Court'.

Before the Court considered the validity of the Preliminary Objection, Albania, not having a judge of its own nationality upon the bench, exercised its right under Article 31 of the Court's Statute and designated the President of a Chamber of the Supreme Court of Czechoslovakia as judge *ad hoc*.

The Court was faced with two problems. Firstly, whether the application of the United Kingdom was so irregular as to preclude the exercise of its jurisdiction by the Court, and secondly, whether Albania was bound by virtue of Article 25 to accept the Council's recommendation and submit to the jurisdiction. It says a great deal for the bench of the International Court of Justice that in this, its first judgment, nearly a unanimous verdict was delivered. From the standpoint of the jurisprudence of the Court it is of little importance that the judge *ad hoc* delivered a dissenting opinion.

As regards the first question the Court held that, by its letter of July 2, the Albanian Government had submitted to its jurisdiction. In that letter Albania expressly declared its acceptance of the Security Council's recommendation concerning judicial settlement. The Albanian Government also stated that despite the irregularity in procedure, it was willing to appear before the Court, and such language 'cannot be understood otherwise than as a waiver of the right subsequently to raise an objection directed

against the admissibility of the Application founded on the alleged procedural irregularity of that instrument '. Finally, the Albanians convinced of the justice of their case, had accepted in precise terms ' the jurisdiction of the Court for this case '.

It was evident, therefore, that Albania had voluntarily accepted the Court's jurisdiction. Since there is nothing in the Court's Statute or Rules regulating the manner of this acceptance, the Court declared that acceptance need not be simultaneous but may be expressed by separate and successive acts. The Court also decided that, in the absence of any express provision to the contrary, there was nothing to prevent proceeding by Application so long as the other party accepts the jurisdiction, which, by its letter, Albania had done. When dealing with these procedural points the Court showed its sense of continuity with the former Permanent Court of International Justice, for it cited in its support, an extract from that Court's judgment in the case of the *Minority Schools in Upper Silesia* (1928).

Having construed the letter in this way, the bench did not deem it necessary to discuss the interpretation of Article 25. A minority of seven of the fifteen judges, however, appended to the judgment a statement of their separate opinion on this point. They argued that as the claim was based on this ground it should have been considered, for then the letter might not have required construction. In their opinion, the question of compulsory jurisdiction should have been dealt with before any question of voluntary submission.

It is submitted that the minority were correct. Albania had accepted the obligations of a Member of the United Nations and all the duties imposed by the Charter. It is suggested that logic requires that, before all else, the Charter should be interpreted to see what obligations are in fact imposed. Had Article 25 been construed as Great Britain contended, Albania would have been subject to the Court's jurisdiction whether it consented or not. In fact, the minority held that the word ' recommendation ' was to be construed in its normal sense, and was, therefore, not a decision in the meaning of Article 25 of the Charter of the United Nations.

The parties informed the Court on the day the judgment was delivered that they had now signed an agreement submitting to the Court the question of responsibility for the incidents in the Corfu Channel.

L. C. Green.

ii. Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion (I.C.J. Reports 1948, p. 57)

As a result of the actions of certain members of the Security Council in connection with applications for admission to membership of the United Nations, the General Assembly decided in November, 1947,

to apply to the International Court of Justice for an advisory opinion on the legality of a condition by which a member makes his consent for the admission of candidates dependent on circumstances not expressly mentioned in Article 4 (1) of the Charter. In particular, the Court was asked to state whether a Member, while recognising that the conditions of that Article were fulfilled, could subject its affirmative vote to the additional requirement that certain other States were to be admitted to membership at the same time as the State upon whose membership the vote was then taking place.

According to Article 4 (1) of the Charter, membership is open to all peace-loving States which accept the obligations of the Charter, and are judged by the Organisation to be both willing and able to carry out those obligations. The problem before the Court turned, therefore, upon the extent of discretion enjoyed by the Security Council and the General Assembly in the exercise of their votes in this matter, and upon the further question whether the conditions mentioned in Article 4 (1) were exhaustive or not.

In its first advisory opinion, unlike its first judgment, the International Court of Justice was unable to deliver a unanimous opinion. Of the fifteen judges on the bench six dissented. Of these, Vice-President Basdevant of France, Judges Winiarski of Poland, McNair of Great Britain, and Read of Canada, issued a joint dissent, while Judges Zoričić of Yugoslavia and Krylov of the Soviet Union issued individual dissenting opinions. Both of these, however, announced that they substantially agreed with the reasons put forward in the joint dissenting opinion of the four judges first mentioned; to a certain extent, therefore, we are entitled to regard this joint dissenting opinion as representing the opinions of the six dissident judges. Of the separate opinions delivered by members of the majority, that of Judge Alvarez of Chile is primarily concerned with discussing the dynamic character of international society, and its development from a society into a community. It is submitted with respect that most of this opinion is *obiter* and must therefore be disregarded.

The first difference between the majority and the minority is to be found in the construction placed by each on the question submitted to the Court. The majority considered that they were not asked to comment upon the actual vote but only upon the statements made by a member concerning the vote it proposed to give. The minority, on the other hand, pointed out that the Court was asked whether a member could make its consent dependent on conditions, and since this consent could only be expressed by the vote, they were of opinion that the question must refer to the vote itself. All agreed, however, that the question, although it referred to a political function exercised by a political body, since it related to the interpretation of a treaty was of a legal character and amenable to interpretation by the Court, and this even though

the question was formulated in the abstract. But not all the judges were equally happy about questions being framed in this way. With this exception, every Member of the Court confirmed the power of the Court to interpret the Charter of the United Nations. Such a decision should provide an answer to those who consider that international judges too frequently allow national interests to becloud their objective approach, for Judge Krylov by so doing disagreed fundamentally with the approach of his country's spokesman to this problem at the United Nations.

The fundamental difference between the two sides lay in the fact that the majority construed the conditions laid down in Article 4 (1) as being exhaustive and whichever State satisfied them as being entitled to admission. The minority on the other hand regarded this Article as laying down the minimum conditions, and merely meant that no State not fulfilling these conditions could be admitted to membership. In their opinion, therefore, the members of the United Nations could make the admission of new members dependent on whatsoever conditions they considered apposite, even to the extent of insisting on the admission of one in return for the admission of another. The minority pointed out, however, that the discretion allowed to Members which enabled them to introduce conditions must be exercised in good faith and in accordance with the purposes and principles of the Charter. Even the majority agreed that the judgment which they recognised as belonging to the Members of the United Nations might be subjected to extraneous conditions. They said that 'Article 4 does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article. The taking into account of such factors is implied in the very wide and very elastic nature of the prescribed conditions; no relevant political factor—that is to say, none connected with the conditions of admission—is excluded'. This statement is so wide, that it is difficult to see how it differs from a direct statement that the imposition of conditions is legal.

As in the case of its first judgment, the Court once again referred to the practice of the Permanent Court of International Justice. But unlike the judgment the advisory opinion is not binding in character. Even if it were, it would simply mean that the State wishing to attach conditions to its affirmative vote would have either to link its conditions to the requirements of Article 4, or else make its conditions clear during the early debates and then vote against the admission of the particular applicant without explaining why.

It appears, therefore, however one looks at this advisory opinion of the International Court of Justice, that it will not make any difference in the practice of the United Nations where the admission of new Members is concerned.

L. C. Green.

REVIEWS

The Federal Administrative Procedure Act and the Administrative Agencies. Edited by George Warren. [The New York University School of Law. 1947. vii and 612 and (index) 17 pp. $7.50.]

This book is the result of a series of meetings held by the New York University School of Law to consider the effect of the Federal Administrative Procedure Act. It is a print of the twenty papers read and of the discussion which followed each. Six of the papers are general, on the legislative background of the Act (by Dean Vanderbilt), the provisions relating to rule making, adjudication and judicial review, and an analysis and criticism of the Act. The remaining fourteen papers are concerned with its effect on individual agencies. The speakers are in their own spheres all experts, either prominent in the academic world or senior officials of or distinguished practitioners before the various agencies. Some, like Prof. John Dickinson, combine distinction both as writers and practitioners in administrative law.

There are inevitable disadvantages in a book so produced. The papers were prepared on a common scheme but without reference to each other, and not all of them are of equal merit, nor is the discussion always illuminating. Conflicting views are expressed in different places with equal certainty and sometimes without full reasoning; but, if these conflicts can be counted a disadvantage they have been turned to good purpose since the scope of the index and the care with which it has been compiled make easy comparison possible. Indeed, the difference of approach of the various speakers is one of the great merits of the book; by no means all are friends of the Act, some are critical of particular provisions and others, like Dr. Blachly, violently attack it both in principle and detail. The discussion is certainly not one-sided and this diversity together with the strongly practical bias of the majority of the speakers, makes the book an appreciation of the working of the Act of great value, particularly to a foreigner acquainted with the general problems which the Act was intended to solve, but less well versed in the details of American administrative agencies. It would, however, be unfair thus to limit the value of the book.

The general purpose of the Act in laying down a minimum standard of good conduct to be observed in rule making and adjudication by administrative agencies is clearly brought out. The Act requires publicity for the organisation and procedural requirements of any agency, the consultation of interested parties in rule making, the separation of the functions of prosecution and decision in hearings, and that decisions shall be reasoned and public. None of these general requirements are, of course, without important limitations and exceptions, and the extent of these limitations is emphasised in the lectures, as is the fact that the justification is in many cases not theoretical but the necessity for a compromise to secure the speedy passage of the Act. The book is, however, more than a mere commentary; it illustrates clearly the atmosphere in which administrative law is discussed. Frequently the discussions reveal a suspicion of administrative bodies such as the belief of some questioners that compliance with the Act will be purely formal and that secret instructions will still issue to examiners. This suspicion may well die slowly but its death can be hastened by the other attitude here disclosed, of a pleasing readiness of agency officials generally to observe the spirit of the Act even when not compelled by its letter. The predominance of this spirit is in strong contrast to that of Commissioner Aitchison, of the Interstate Commerce

Commission, who is reported to have said, 'I think we should take the rules as they stand as our base and continue to enforce them until it is shown that it is imperatively necessary to deviate from them'.

Generally it is evident that the Act has had the effect within administrative agencies of 'quickening their sense of responsibility toward the achievement of sound government', and this, with the careful analysis of its functions which it has compelled each agency to make, would alone have justified the Act. That it has done more already is evident. Immediately the provisions for publicity for procedure and organisation are probably the most valuable in taking the mystery out of administrative law by making the whole body of it readily accessible to parties and students. Without this mystery many of the prejudices and obstacles which obstruct a calm discussion of the subject must go, leaving a good prospect of proper development based on a fuller knowledge.

The final measure of success of the Act cannot yet be judged; the speakers demonstrate the ambiguities and difficulties of definition which the Act contains, such as the exact scope of the judicial review provisions or the interpretation of such phrases as 'substantial evidence', and until these and other doubts of major importance are solved by judicial interpretation it will be too early to say with certainty whether the Act has unduly fettered the administration or, on the other hand, whether it has provided sufficient and satisfactory methods of control. Equally the developments may depend greatly on the attitude of the agencies themselves, whether they act in the apparent spirit of the majority or in a reluctant restrictive one. The latter spirit could turn the Act into nothing but a fruitful source of litigation, but at worst it seems unlikely that developments will justify the strictures of Dr. Blachly. Indeed in a sense it will not matter if they do, for the speakers make it clear that the Act is not to be regarded as final, but as the beginning of a new system of procedural law the working of which must be examined from time to time from the point of view of both administration and public. It is the need for intense study which Mr. McFarland places first in his analysis of the Act. It is possible that the Act may be remembered as an experiment rather than for its particular provisions, and it is in this respect that the book has most direct interest for English readers. It is true that it is mainly concerned with the independent regulatory commissions, and the solutions worked out for them are not necessarily applicable here. The system of hearing examiners whose decisions are capable of becoming final underlies much of the Act, and there are obvious difficulties in applying such a system where the doctrine of ministerial responsibility to Parliament prevails. Yet the problems of both countries are similar, as is shown by Dean Vanderbilt in his introduction, and an English reader cannot help feeling both envy and regret. No doubt the Committee on Ministers' Powers caused heart searchings within administrative bodies both during the preparation of evidence and as a result of the report, and, outside these, gave impetus to discussion, yet the time that has passed and events which have happened since the report have blunted its effect as a stimulus to official conscience, a process hastened by the general neglect of its recommendations. The worst features of such cases as *Blackpool Corporation* v. *Locker* can but excite doubt, at least, whether a right sense of responsibility is present in all branches of the administration, and point to the need of some broad measure here similar to the American Act. In contrast the Attorney-General's Committee on Administrative Procedure has been quickly followed by this Act which, since it both recognises and attempts to regulate generally administrative law-making and adjudication, provides a continuing standard by which such actions can be judged and a continuing reminder that ease of working cannot be the sole aim of administration. The present work can be recommended therefore not merely as an exhaustive commentary on the Act with which it deals but also as a study of an attempt to solve problems which in a slightly different shape still call for some attempted general solution here.

J. D. B. Mitchell.

Crown Proceedings. By Glanville L. Williams, ph.d., ll.d.(cantab.). [London : Stevens & Sons, Ltd. 1948. xviii and 157 pp. 12s. 6d.]

This critical examination of the Crown Proceedings Act, 1947, considers, first and shortly, the liability of the Crown arising under contract, quasi-contract and trust; secondly, and at length, the liability in tort; thirdly, the position of the Crown as master both in relation to contract (the questions of dismissal, reduction of pay, arrears of pay and assignment of pay and pensions), and in relation to tort (the Crown's action *per quod servitium amisit* and the servant's remedy against the Crown and fellow-servants); fourthly, the action for a declaration; fifthly, the general advantages of the Crown in substantive law; and sixthly, in three chapters, the procedural changes.

Let it be said at once that the examination is most thoroughly carried out with the power of analysis we expect from its author. The purpose of a book of this kind is to look for future trouble and Dr. Williams has found it in fair abundance in this Act which, at the same time, he calls 'a most valuable reform measure'. Almost every page carries a point worthy of comment, but we must confine our attention to a few.

Perhaps the most important conclusion reached by Dr. Williams is that none of the new public corporations is a servant of the Crown and therefore each is itself liable in tort in its corporate capacity unless the constituent Act otherwise directs. He reaches this conclusion in the following way. Before the Crown Proceedings Act, public corporations could sue in tort but those which were also Crown servants could not be sued as their property could not be touched. On the other hand, those which were not Crown servants (*e.g.*, local authorities, Mersey Docks and Harbour Board, etc.) could be sued. Dr. Williams contends strongly that the new corporations cannot for this purpose be divided into commercial and social service groups, with the former not being and the latter being Crown servants. Under the constituent Acts, clearly the N.C.B., the Electricity Boards and the Transport Commissions are liable in tort and are subjected to special periods of limitation; similarly subjected are the New Towns Development Corporations, while the hospital authorities are expressly made liable. These last two are, of course, social service corporations, and Dr. Williams denies that the express provision for hospital authorities infers that without it they would not be liable. The Central Land Board causes some difficulty as it is declared to exercise its functions on behalf of the Crown. Dr. Williams argues that this does not necessarily mean that it is therefore a Crown servant, pointing out that an independent contractor equally acts on behalf of his employer; he suggests that perhaps the phrase makes the Board a Crown 'agent'. It seems, however, a little inconclusive to argue that because an independent contractor may be said to act on behalf of his employer, the Central Land Board is more likely to be an agent than a servant. Admittedly, the phrase 'on behalf of' does not *necessarily* indicate a master-servant relationship, but it may very well be so used. Further, the distinction between the two types of corporation is real and is reflected in the Acts. The clause for the commercial corporations reads: 'The Minister may, after consultation with the Board, give to the Board directions of a general character as to the exercise and performance by the Board of their functions in relation to matters appearing to the Minister to affect the national interest, and the Board shall give effect to any such directions' (Coal Industry Nationalisation Act, s. 3 (1) —the others are similar). On the other hand, section 3 (1) (3) of the Town and Country Planning Act reads: 'The Central Land Board shall, in the performance of their functions under this Act, comply with such directions of a general character as may be given to them by the Minister. The functions under this Act of the Board, and of their officers and servants, shall be exercised on behalf of the Crown'. On the whole, we suggest that Dr.

Williams does not give full weight to the argument that some of the social service corporations may properly be regarded as Crown servants. We must, however, agree with him that far less difficulty will be encountered if they are not so regarded.

The Act makes the Crown liable 'in respect of torts committed by its servants or agents'. This, says Dr. Williams, is bad doctrine for, technically, vicarious liability arises by imputing to the master acts and states of mind of the servant and not by making him liable for the torts of the servant; the master may be liable even though his servant has not committed any tort or any actionable tort. This principle Dr. Williams finds laid down in *Twine* v. *Bean's Express* and exemplified in *Smith* v. *Moss*. We suggest that these two cases are not good enough authority. The *ratio* of the first case in the Court of Appeal was that the servant was not acting in the course of employment and the master was held not liable; further, in both cases the servant did commit a tort. To establish as orthodox the doctrine stated by Dr. Williams, we must find a case where the servant committed no tort but the master was held liable. *London County Properties* v. *Berkeley Property Co.* comes nearest, but cannot by itself be considered sufficient, in view of the handling it received in *Anglo-Scottish Beet Sugar Corporation* v. *Spalding U.D.C.*

Finally, we may note Dr. Williams's treatment of *Admiralty Commissioners* v. *S.S. Amerika* and *Att.-Gen.* v. *Valle-Jones*. His arguments for avoiding the effects of the first case and supporting the second are most ingenious and will, we hope, be adopted. Attention must also be drawn, with no space for comment, to a lengthy, excellent and condemnatory analysis of section 2 (6).

Dr. Williams has subjected this Act to an examination remarkable for its incisiveness. He has held each section up to the light and shaken it vigorously—sometimes too vigorously perhaps—to see if anything loose would fall out. The pieces at his feet, and no doubt others he has failed to dislodge, will be examined by the courts and either fashioned to fit or returned to the Legislature for replacement.

J. A. G. Griffith.

Crown Proceedings. By Ronald McMillan Bell, m.a., Barrister-at-Law. [London : Sweet & Maxwell, Ltd. 1948. xxxii and 251 pp. 17s. 6d.]

Mr. Bell has set himself the ambitious task of presenting 'a full statement of the law relating to actions by and against the Crown as affected by the Crown Proceedings Act, 1947', to quote the long title of his book. If, in the reviewer's respectful opinion, the outcome is not uniformly successful, it must be said at once that the book embodies a mass of useful information for the practitioner, concisely presented, and bears ample witness to the industry of its author.

The chapter headings are: Contract, Quasi-Contract and Detinue; Tort; Crown Debts and Chattels; Time and Laches; Relator Actions; Real Property; Admiralty; and Procedure. The general character of the book is illustrated by the fact that the last chapter is appreciably longer than the first two together.

Although there is much valuable material on procedure and also on relator actions, it cannot be said that the treatment of substantive law is always adequate. The Crown Proceedings Act raises more difficulties than a reading of Chapters I and II and the separate commentary on the Act would suggest. For example, which, if any, of the recently created public corporations are to be regarded as emanations from the Crown? What is the position of those Government departments which are not included in the list of 'authorised departments' but which were incorporated by statutes that did not include a 'sue and be sued' or similar clause? Does the Fatal

Accidents Act bind the Crown? Had these problems been discussed the book would have been longer but more complete. Moreover, the desire for brevity has sometimes led to ambiguity. On p. 29 the author is commenting on section 9 (1) of the Act, which provides that no officer of the Crown shall be subject to any civil liability (except at the suit of the Crown) for anything done or omitted to be done in relation to a postal packet or a telephonic communication. He points out that this alters the former rule whereby the Crown servant was personally liable in tort for 'his wrongful acts or defaults in relation to the postal and telephone services', and in a footnote cites *Bainbridge* v. *Postmaster-General*. This case is, of course, a leading authority on a rather different point, but the plaintiff's claim was based on personal injuries caused, so she alleged, by the negligent execution of repairs to an underground telegraph cable for which a post office engineer was responsible. If such a case were to recur and the engineer had been negligent, his liability would be unaffected by the Act, which deals only with *individual* telephonic communications. No doubt Mr. Bell did not intend to suggest otherwise, but a reader would be forgiven for misinterpreting him.

In short, despite the many merits of this book, it errs on the side of brevity. Should a second edition be called for, parts will need to be rewritten and expanded if *Bell* is to acquire the reputation of being the standard work either on Crown Proceedings or on the Crown Proceedings Act.

S. A. de S.

Lords and Commons. By Frank Hardie and Robert S. W. Pollard, with a Foreword by Harold J. Laski. [London: Fabian Publications, Ltd., and Victor Gollancz, Ltd. 1948. 38 pp. 2s.]

The publication of this Fabian pamphlet coincides with the controversy over the Parliament Bill. The authors have sought to show that the House of Lords, as at present constituted, cannot properly be entrusted with the power to delay legislation for a period of two years. Mr. Pollard gives a concise account of the unsympathetic attitude adopted by the House of Lords towards a variety of progressive measures, ranging from local government reform to the removal of religious disabilities, and Mr. Hardie carefully analyses the events of 1909–11.

The authors have succeeded in drawing up a formidable indictment against the past record of the Lords; though it must be remembered that the Conservative case against the Parliament Bill rests mainly on the assertion that the conduct of the Lords between 1945 and 1947, in face of a Labour majority in the Lower House, is of more relevance than their conduct before the First World War.

The limited scope of the pamphlet has prevented the authors from discussing some of the principal issues which have since emerged from the controversy: whether, for example, it is justifiable to alter the powers of the Upper House without reforming its composition. In an interesting foreword, however, Professor Laski does touch upon some questions of composition and powers. After rejecting a number of suggested methods of representation, he advocates a small second chamber to be elected by the House of Commons, for the duration of each Parliament, from persons submitted to it by the political parties and independent members of the House.

S. A. de S.

A Concise History of the Law of Nations. By A. Nussbaum. [New York : Macmillan. 1947. 361 pp. 22s. 6d.]

International lawyers will welcome Professor Nussbaum's new book with some measure of enthusiasm for there is great need of an up-to-date *Concise History of the Law of Nations.* Their expectations will, unfortunately, not be met. What Professor Nussbaum has provided is not so much a history of the law of nations as a history of the doctrine of international law.

We are presented with synopses of the lives and works of various writers, but nowhere is there any discussion of, for example, the doctrines of continuous voyage and ultimate destination, full powers and ratification, recognition or superior orders. The account of war crimes, in fact, is most unsatisfactory. All we are told is that 'acts of inhumanity not required for military purposes are generally recognised as violative of the law of nations, but the rule is wholly vague and elusive under the dominance of the total-war idea. The trials of war criminals after World War II may give it a more specific meaning' (p. 197). Nobody reading this book will know that there was a war crime trial held at Breisach in 1474. Further, although the Acknowledgments are dated December, 1946, that is two months after the delivery of the Nuremberg Judgment, no attempt is made to estimate the position of the Judgment or of the Nuremberg Charter in the history of war crimes or of aggressive war. This latter omission is the more surprising in view of the fact that so much of Professor Nussbaum's analysis of doctrine is devoted to theories of the 'just war'. The way has been left open for such an estimation, for in the Introduction Professor Nussbaum has written 'our inquiry ends—though not rigidly—with the outbreak of Word War II'. It is submitted that Nuremberg is one of those matters in which rigidity would be out of place.

Any person attempting to write a history book is faced with the problem of method. He can either approach his subject chronologically, or else take each facet of it separately and trace its individual development. There is much to be said for the view that the second method is to be preferred when dealing with the history of any branch of law. Professor Nussbaum has, however, adopted the former. The result is that in order to obtain a historical survey of the development of any particular concept, reference must be made to six or seven different places in the text, none of which is connected with the other. Thus, on pages 35–6 we learn that privateering was introduced in the Middle Ages, on page 82 that Gentili regarded it as lawful in his *De jure belli,* and on page 186 that privateering was abolished by the Declaration of Paris, 1856. A similar cursory treatment is given to the subject of contraband. In the twelfth and thirteenth centuries the Church declared the supply of certain goods to the Saracens to be *contra bannum* (p. 26), but the beginning of contraband proper was witnessed in the Middle Ages (p. 36), although not until the seventeenth century did it become the subject of national legislation (pp. 91–2). In 1856 the Declaration of Paris permitted the capture of contraband on neutral vessels (p. 186), and in 1914 the list of goods regarded as contraband was greatly extended (p. 246).

In any work devoted to the study of the doctrine of international law it is reasonable to expect to find some estimate made of the relative value of the approaches adopted by various writers to the same problem.

One of the most famous controversies in the doctrine of international law is that between Grotius and Selden on the freedom of the seas. This freedom was maintained by Grotius, and 'among his adversaries the most distinguished one was the Englishman John Selden' (p. 107). Is it unreasonable to expect a work of this nature to indicate the basis on which each founded his belief, especially as 'Selden's teachings were the acknowledged basis of official English doctrine for more than a century' (p. 108)? A similar criticism may be levelled at the treatment of Sir Robert Phillimore, 'the foremost English author of the nineteenth century on international law' (p. 55).

When his *Commentaries* are mentioned, however, there is no reference to their substance or value, but merely to the 'common-law fashion' in which they are written (pp. 235–6).

Mention of Selden and Phillimore leads one to question why other English writers are not included. Before 1914, of even more significance than Oppenheim was Westlake, who finds no place in the book; and if Oppenheim in the more recent editions can be mentioned, why is there no reference to Dr. H. A. Smith or Sir Arnold McNair, both of whom have dealt with international law from the standpoint of British State practice? Similarly, it is a little strange to find Professor Hyde's work on international law in American State practice cited without any allusion to John Bassett Moore, whose teaching and example Professor Hyde would be the last to discount. It is also somewhat surprising to note that Professor Nussbaum excludes from his 'Historiography of International Law' Hosack's *On the Rise and Growth of the Law of Nations,* 1882, especially as this dealt with the history of the law of nations, and not merely of its doctrine.

Professor Nussbaum does not go so far as to say that Grotius—the biographies of whom by Burigny, 1754, and Butler, 1826, are not cited—is the 'father of international law'. His acquaintance with the numerous authors writing before 1625 renders this impossible. He does, however, say that 'more than Gentili and even Vitoria, Grotius is entitled to the claim of being the "father of international law"' (p. 107). It would probably have been more correct to attribute this position to no single writer, for international law has grown from the teachings of many as modified by the practice of States. As regards Vitoria, though he lived from 1480 to 1546, he is still frequently referred to by Catholic writers in preference to Grotius. With Gentili, on the other hand, Professor Nussbaum himself shows that on many points Grotius based his teaching on that of his predecessor, as for example in connection with the immunity of a diplomatic representative's movable property (pp. 77, 108). It is to be regretted that the learned author has not paid more attention to the comment of Professor Holland that 'the first step towards making International Law what it is was taken, not by Grotius, but by Gentili'.

For anyone who seeks a selective *Who's Who* of the doctrine of international law, this *Concise History* provides a useful answer. Doubts may arise, however, as to why such persons as Crucé, Sully, Penn and the other 'new order' thinkers, Hobbes, Locke, Rousseau, Austin, Mancini, Jellinek and Duguit are dealt with in detail, while of Textor we learn, on two occasions, that 'it seems impossible, by any stretch of the imagination, to consider as a "classic" (his) *Synopsis of the Law of Nations*' (pp. 125, 327), which was included in the Carnegie reprints of the *Classics of International Law* in 1916. Surely this is being a little hard on an author who, in 1680, had much to say on 'the effects of war and what is lawful therein' (chapter 18), 'the rights of the victor over the vanquished' (chapter 28), and 'the extinction of sovereignty' (chapter 30), all of which are apposite from the standpoint of Nuremberg and the present status of Germany. The learned author similarly regards as a waste of effort the Carnegie reprint of Legnano's *De bello, de repraesaliis et de duello,* which Professor Brierly considered sufficiently important to translate. Apart from this it may well be contended that anything written as early as 1360 on war and reprisals deserves consideration as a classic.

The reviewer has avoided dealing with any of the various controversial assertions made by Professor Nussbaum, nor has he drawn attention to the points on which the teachings of early writers are relevant today, nor to those points on which they indicate the path which the modern world could well follow. The reason for this is that he is of opinion that *A Concise History of the Law of Nations* is really 'A Selective Analysis of the Doctrine of International Law', and it is on this basis that he has reviewed it. There is still need in international law for a history that is, in fact, a History of the Law of Nations.

L. C. Green.

THE LAW OF SUPPORT IN RELATION TO MINERALS. By F. A. ENEVER, M.C., M.A., LL.D., of Gray's Inn, Barrister-at-Law. [London: The Solicitors' Law Stationery Society, Ltd. 1947. xiv and 162 pp.]

DR. ENEVER has filled the post of Legal Adviser and Registrar to the Coal Commission, and his knowledge and experience of mining law deserves our careful attention. He has divided his text into three Sections: the first deals with the common law, the second with the relevant statute law, and the third, headed 'Conclusions', contains the author's suggestions for reform. This tripartite division should be borne in mind when using the book, for one gets the impression that the real purpose of the first two Sections is not so much to make a formal exposition of the law as to lay the foundation for the third Section on its reformation.

Any other view would leave the author open to the criticism that the book, especially in its first Section, is badly arranged and that the treatment lacks balance and perspective. It is, for instance, curious to find that the sub-heading 'Nature and incidents of the right of support' comes at the very end of the common law Section rather than at its beginning. Moreover, it is extremely short. *Backhouse* v. *Bonomi* is dismissed in a line, while *Humphries* v. *Brogden* does not appear at all, though it is referred to casually in earlier pages.

Essentially, the bulk of the first Section consists of a detailed commentary upon the requirement of either express words or necessary implication for the purpose of rebutting the common law presumption in favour of a right to support. Twelve propositions are enunciated, each supported by cases and extracts from judgments. The author's choice of materials is not always happy. Thus, the proposition that 'Inclosure Acts are construed similarly to other statutes and instruments' is followed by twelve pages of text, including long extracts from many judgments, the bulk of which, however interesting in themselves, are essentially irrelevant to the proposition in issue. Moreover, in one instance (where the statute authorises the mineral owner to work the minerals 'as fully as if this Act had not been passed'), the cases referred to in the text have treated the statutory provision 'as a dead letter for any practical purpose', thus flatly contradicting the very proposition they are intended to support. Finally, there has in recent years been a considerable growth in scientific knowledge as to the effect of mining operations upon subsidence, and it is disappointing that Dr. Enever has not given more space to the legal problems arising out of transactions and statutes made in the light of this increased knowledge. With the singular exception of the important judgment of Maugham, L.J., in *Warwickshire Coal Co.* v. *Coventry Corporation,* [1934] Ch. 488 at pp. 517–8, all the cases are referred to, though not under one heading. But the importance of the topic merits its separate discussion, and we should have welcomed Dr. Enever's views on the trend of recent legal decisions.

The second Section, on statute law, is better balanced and consequently more satisfying. By wisely eschewing the temptation to set out the *ipsissima verba* of each statute, the author has succeeded in producing an extremely interesting and readable account of a subject which might easily have fallen into the depths of dullness. There is even something of artistic unity in the constantly recurring theme of *Pountney* v. *Clayton* (1883), 11 Q.B.D. 820, a case which, despite subsequent limitations upon its scope, raises issues of general importance and deserves to be better known. The facts were simple. After the grant of a mining lease, the surface was acquired by a railway company, who subsequently sold it to the plaintiff as superfluous land. It was held that, as a result of the Mining Code in the Clauses Act of 1845, the company acquired no common law right of support; that consequently they could not convey any such right to the plaintiff; that the plaintiff could not take advantage of the protection afforded to railway companies by the Code; and that as a result

he was entirely at the mercy of the mineral lessee, even though the lessee's activities were contrary to the terms of his lease. Dr. Enever rightly calls this an 'amazing decision', but he makes no attempt to refute it. Clearly the predominating factor was the maxim *nemo dat qui non habet.* A more traditional approach might have achieved a different result. The plaintiff was seised of the surface; to cause a subsidence was prima facie a nuisance, and should have been justifiable only by relying on the strength of the mineral lessee's title and not on the weakness of the surface owner's. Such a result was arrived at in *Westhoughton U.D.C.* v. *Wigan Coal and Iron Co.,* [1919] 1 Ch. 159, perhaps because *Pountney* v. *Clayton* was not referred to. In this case the surface lessee recovered compensation for subsidence from the lessee (from a common landlord) of the minerals in accordance with the terms of the defendant's lease. The court refused to decide the uncomfortable point as to whether or not the surface lessee was the landlord's 'assign' so as to enable him to sue directly on the covenant, and contented itself with holding that as against the occupier of the surface the defendant could justify his action only within the ambit of his lease. 'Prima facie, an owner of land is entitled to the surface and all below it *ex jure naturae,* and it is for those who claim to derogate from that right to establish a title in themselves to do the things done or claimed to be done' (*per* Duke, L.J., at p. 173). Yet this sturdy Anglo-Saxon approach is immediately followed, without any appearance of inconsistency, by a reference to the *nemo dat* principle, in the form of a citation from Lord Justice Blackburn, who must bear the responsibility for the perpetuation, if not the importation, of several such alien growths. But today it is fashionable to prefer the superficial jurisprudence of Rome in her decadence to the more virile pragmatism of Littleton and Coke, and this is not the place to criticise the New Look.

The last Section begins with a useful summary of the difficulties inherent in the present state of the law, though its first page somewhat overstates the case by ignoring decisions such as *Beard* v. *Moira Colliery.* The 1927 Report of the Royal Commission on Mining Subsidence is discussed, and various detailed suggestions for reform are put forward. On the whole, however, it is evident that Dr. Enever would prefer something approaching a clean sweep, an 'entire reorientation of ideas'. We would suggest that this plea is symptomatic of the general malaise felt by many people in relation to land law as a whole. The basis of that law is still the outlook of the settled agricultural economy of the eighteenth century; and this is no doubt the source of that bias in favour of the surface owner which is the major premise of the law of support. The problem is to reconcile it with the industrialism of the nineteenth century and more recent experiments with a planned economy. And so Dr. Enever would leave the fundamental conflict between surface and minerals to a local inquiry under the auspices of the Minister of Town and Country Planning, a typically English method of avoiding the issue by creating a new procedure with which to obscure it.

This book will be of considerable assistance to those practitioners who have dealings with the National Coal Board. But it is more than a practitioner's book; it will appeal to those who are prepared to think about the law as well as to apply it. There is a growing demand for monographs of this kind, and we are grateful to Dr. Enever for contributing his quota to the supply.

A. D. Hargreaves.

The Year Book of World Affairs, 1948. Published under the auspices of the London Institute of World Affairs. [London : Stevens. viii and 376 pp. 20s. net.]

The appearance of the second volume of this series is to be welcomed as a valuable contribution to the study of international relations, including as it does articles on the political, economic, moral and legal aspects of the subject.

Professor Keeton in his article on 'British Foreign Policy' reviews the changed position of Great Britain in the post-war period and the need to adapt our policy, if we are to retain our influence and power. Because of economic and strategic factors Western Union is as essential to Britain as it is to the countries of Western Europe, but the establishment of this union involves close alignment with the United States. As the writer sees it, Britain must accept the necessity of a final choice between West and East, and both our position and our sympathy dictate the former. Mr. Bonn supplements this with an account of the transformation which has taken place in the foreign policy of the United States, which has assumed the scale of political revolution. But he does stress the reluctance with which American public opinion and some of the political leaders have abandoned the state of comparative political innocence and accepted the onerous responsibilities and far-reaching commitments which characterise the present policy. He gives a warning that if Western Europe does not use American assistance in order to restore its productive efficiency the resulting disappointment and even disillusion is quite likely to cause a reversal of policy, which would be disastrous to both. We are indebted to Sir Frederick Whyte for an invaluable, sober and balanced survey of the problems of post-war Japan. He draws attention to two salient features of Japan's economic position; firstly, the declining birthrate, and secondly, the dependence of Japan on imported food and raw materials. The latter factor suggests that Japanese ability to export industrial manufactured goods is necessary if she is to be economically stable or viable. Sir Frederick is rather sceptical as yet of the democratic regeneration of Japan. While the country is occupied and her policy controlled by the Allies, it is premature to conclude that the Japanese people have accepted the democratic way of life. The proof will come after the period of tutelage is over. Although foreign influence may be important, only the Japanese themselves can evolve a democratic system of government. Mr. G. E. Stent deals with the growth of the colour problem in South Africa. He shows that the policy of segregation would undermine the South African economy, which depends on adequate supplies of native labour in the mining industry and the towns. He does seem to support the view that the opinion of the Europeans is tending more and more towards racialism, while among the non-Europeans there are growing up organisations which are determined to challenge white ascendancy. Between two such mutually hostile forces the South African Liberal elements find themselves in somewhat of a dilemma.

Dr. Schwarzenberger has written a rather thoughtful and provocative article on the 'Judgment of Nuremberg'. He regards the court as a joint tribunal under municipal law, set up by the victors acting in their capacity as sovereigns of Germany rather than as an international tribunal in the real sense of the term. As to the law applied by the tribunal, he questions the validity of the assertion that aggressive war is already a crime. He draws a distinction between war as a breach of treaty obligations and aggressive war as a crime. Although States may and do recognise the former, they are far from recognising the latter and acting upon it, as can be shown by the attitude of States to repeated aggressions between 1931 and 1940. Mr. Green examines the working of the Security Council, and finds that its record so far does not fulfil the hopes expected of it. Its effectiveness depended upon the co-operation of the Great Powers, the permanent members, of which there has been little evidence.

There are two very informative articles on the various organisations established to deal with the economic problems of the immediate post-war period. Mr. Alexandrowicz surveys the work of the Emergency Economic Committee for Europe, and the coal and transport organisations. It is remarkable how efficient and successful these bodies were, considering the difficulties they had to face. Mr. Goodman supplements this with a survey of the work of UNRRA, which undoubtedly prevented the complete collapse of

the economy of the liberated countries, through the distribution of emergency relief.

Mr. E. Ker discusses the differences between the moral behaviour of individuals and groups, with particular reference to international relations. The moral behaviour of the State involves a clash between its obligations to its own citizens and those to other States. The more zealous a State is in performing its duties to its citizens, the more selfish it is likely to behave in its relations with other States, unless it is conscious of an overriding obligation to the world community or the common good. One might agree with the writer that the best way of creating a spirit of world community is partnership in work for the common good, and that would involve an all-round sacrifice of national self-interest.

A most useful contribution is the article on the development of international law and its codification by Dr. Liang, Director of the United Nations Division in charge of this work. He discusses the methods which should be adopted for the encouragement of the progressive development of international law and its eventual codification. The writer quotes the United Nations Charter and an Assembly resolution of December, 1946, as supporting the view that the progressive development and codification of international law should be regarded as two phases of a single process, whose objective should be to develop a legal system adequate to govern the relations of States in this present period. Mr. L. B. Shapiro deals with the features of the Soviet concept of international law. He emphasises the Soviet insistence on consent as the sole basis of the validity of international law, which corresponds with the defence of State sovereignty, which is so prominent and consistent a feature of Soviet propaganda. But they also insist on the sanctity of treaties. The connecting link between these two contradictory theses is the assertion that the only universally valid law is that to which the Soviet Union consents. Mr. Shapiro is right to insist that much of the Soviet doctrine of international law cannot be divorced from the requirements of propaganda.

One feels that most of the articles in this volume have a permanent value to all serious students of international affairs.

I. G. John.

Czechoslovakia between East and West. By William Diamond. Published under the auspices of the London Institute of World Affairs. [London : Stevens & Sons, Ltd. xii and 258 pp. 12s. 6d.]

Mr. Diamond's book on post-war Czechoslovakia has, of course, been overtaken by the events of February this year. Nevertheless it retains considerable interest and value as a description of the attempt to establish a compromise between the traditional Czech adaptation of parliamentary democracy and the concept of 'popular democracy' dictated partly by the exigencies of a pro-Soviet orientation in foreign policy, and partly by the social and economic repercussions of German occupation. The author was clearly aware when he wrote that the duration of this compromise would depend to a great extent on the course of Soviet Foreign Policy and on the relations between the Great Powers. In his chapter on foreign policy he indicates that Czechoslovakia, by the very fact of her geographical position, would be compelled, however reluctantly, to align herself with the Soviet Union and the Eastern bloc if she were faced with that choice or a Western orientation. But her true interests would best be served by co-operation with West and East. But in the last resort the Czechs are very doubtful of the ability or the determination of the Western Powers to protect them. The memories of Munich are still very much alive in the political consciousness of the Czechs.

The author devotes the first part of the book to an examination of the political structure of the post-war State. Three features stand out clearly. In the first place, liberation was followed by the elimination of all the predominantly right wing parties, on grounds of collaboration. As a result the formal and theoretical differences between the post-war parties are very slight. The National Front government was a coalition between parties ranging from a little right of centre to the Communists on the extreme left. There was a large measure of agreement on foreign policy and upon the necessity of a large degree of socialisation of industry. Nevertheless there was a tendency for the supporters and members of the prescribed parties to enter or support those most to the right. This provided the Communists with ample opportunity to attack such parties as the National Socialists, the Slovak Democrats and the People's Party as sheltering collaborators and Fascists, a campaign which reached its climax last February, when these parties were purged of elements obnoxious to the Communist leadership. The second feature was the remarkable growth of the Communist party, attributable to a number of factors; the part they played in the resistance movement, the immediate post-war prestige of the Soviet Union, the fact that they alone of all parties were untarnished by the surrender to the Munich 'diktat', their boldness and aggressiveness, and the fact that in the initial post-liberation period the Czech working class seemed to have moved considerably to the left, although it appears that during 1947 this trend was reversed and that the workers were returning to their former allegiance, the Social Democratic Party. The third feature was the continuation of the feeling of distrust between Czechs and Slovaks, though not in such an acute form as in the late thirties. Despite the agreement of all the parties on the Kosice Programme, the author does note signs of dissension among the members of the National Front, mainly between the Communists and the other parties, the attitude of the Social Democrats being rather equivocal.

Of great interest are the chapters on the economic development and the trade policy of the new Czechoslovakia. The German occupation has caused vast changes in the economic structure of the country which have been intensified by the policy of the National Front Government. The expropriation of landed property held by Germans, Magyars and collaborators, and its redistribution among Czechs and Slovaks, have assumed the features of a minor agrarian revolution and also have changed considerably the distribution of population. The expulsion of the German population has likewise affected it and has also caused a marked shortage of skilled labour, particularly in the light industries, and this undoubtedly was a factor in the political and economic power of the Czechoslovak Trade Union Organisation, and also in the emphasis placed by them and the Government on increased production. The gradual drift of some of the heavy industry to Slovakia which begun in the immediate pre-war years, and was intensified by the German occupation, and the industrialisation of Slovakia became one of the main features of the programme of the Coalition Government. The partial decline of the light industries in the Bohemian borderland as a result of the loss of its former skilled German artisans, together with the temporary eclipse of Germany as supplier of heavy iron and steel goods and chemical products to Eastern Europe, will tend to change the direction of Czechoslovak trade, a much greater share of her trade going to the Eastern European countries. But she will still need her Western markets for a wide range of products. It is clear that the economic interests of Czechoslovakia cannot be satisfied with an exclusive association with the Soviet Union and the Eastern European bloc, although she will naturally play a great role in the industrialisation of these countries.

This book is indeed valuable and essential to all who would understand contemporary Czechoslovakia and the problems of post-war Eastern Europe.

I. G. John.

CASES ON WILLS AND ADMINISTRATION. Third edition. Selected and edited by PHILIP MECHEM, Professor of Law, University of Iowa, and THOMAS E. ATKINSON, Professor of Law, New York University. [Brooklyn: The Foundation Press Inc. 1947. xv and 732 pp. $7.50.]

ONE only needs to turn to p. ii of this volume with the list of the 'University Case Book Series', of which the present work forms one (altogether thirty-six in number) to realise the paramount part played by the system of learning from the leading cases which has become so predominant a characteristic of the teaching of the common law under the American jurisdiction. The perusal of a collection such as this possesses a certain fascination, partly because of the real pleasure which is afforded by experiencing the sense of fellowship in the enjoyment of the common law existing between England and the United States of America (and those within the British Commonwealth whose law and laws are substantially identical with or founded upon the common law) partly because the differences in matter and in manner of presentation, envisagement and procedure as compared with current English practice make one appreciate the fact that the divergences merely point to the necessary recognition that here is a case of one genus—the common law—with the two species, English and American, each manifestly deriving from the one ancestor. Typically transatlantic, the case-book opens with an introduction with its sub-title 'The Rationale of Succession'. It is somewhat surprising to find in this introduction no reference to the Inheritance (Family Provision) Act, 1938, unless it is implied in the oblique reference to the fact in the phrase 'in some countries they are permitted to exercise a nearly absolute control over the disposition of their property . . . to the exclusion of their children and relations, as is substantially the case at this moment in England' (p. 3), and a reference to The Inheritance (Family Provision) Bill (comments by various authors) *Modern Law Review* 296 and note 53 *Harvard Law Review* 465 on p. 11. The cases included textually are largely American, but the notes frequently refer to many English cases, and there is a delicious sense of common ownership of them which confirms the view that the appreciation of the Anglo-American heritage is not merely a matter for oratory, but a living reality. The work is divided into three Parts, Part 1 dealing with Descent and Distribution, Part 2 with the Making and Revoking of Wills, and Part 3 with Probate and Administration. The reader unfamiliar with American terminology will come across unaccustomed words here and there, but they are very obvious in meaning, and offer none of the difficulty confronting the common lawyer, be he English or American, when perusing Scottish legal literature. With regard to procedure, it often helps to hark back in thought to the English legal system of an earlier day, for in many instances to ante-date in imagination the trial of the case explains on historical grounds the basis of the difference. Paradoxical as it may sound, nothing makes old English law appear more clearly as a living system than current American practice. On the other hand one must not assume that former or current English practice is necessarily followed today. For instance, in the introduction to Chapter XV, 'Claims against deceased and his Estate', it is observed (p. 643) that 'in America today, suits by creditors or others for the administration of decedents' estates are practically obsolete. Though in many States a creditor may still establish his claim in an ordinary action against the personal representative, Courts of Probate usually are given exclusive jurisdiction to apportion assets among claims to enforce payment thereof. Moreover, there is now little resort to the traditional equity proceedings . . .'. Occasionally one comes across a frequent and useful term unknown on this side of the Atlantic—'distributee' (p. 713) is a good instance, denoting a recipient of a share under an intestacy or, it appears, also under a will, notably a recipient of a share of residue

(p. 444). On the whole there is more Probate and Administration (in the more restricted sense) in the book than what comes largely as 'paper work' in the Chancery Division, and there is not very much on Construction. Integration of Wills is for England new terminology. It is Probate, and aptly describes the sought process and remedy.

The work is attractively produced, but most attractive of all is to see on one page '*In re Slater*, [1907] 1 Ch. 665, Cozens-Hardy, M.R., said . . .', and a few lines lower on the page 'other form-or-substance cases: *Lewis* v. *Thompson* (1943), 142 Ohio St. 338, 52 N.E. 2.d. 331'. Blackstone appears, as could be expected, as early as page 1, as also the happy phrase 'Anglo-American Student'. It can be truly said that the Bible, Shakespeare and Blackstone are the foundations upon which the superstructure of English speaking unity is built, and the spirit of Anglo-American law owes much to all.

Bertram B. Benas.

Privacy and the Press. The *Daily Mirror* Press Photographer Libel Action. Edited with an Introduction by H. Montgomery Hyde, of the Middle Temple, Barrister-at-Law. [London: Butterworth & Co. (Publishers), Ltd. 1947. v and 250 pp. 6s. net.]

The short point of the decision in *Lea* v. *Justice of the Peace, Ltd.*, is that a press photographer who attends uninvited a private wedding reception and there, contrary to the wishes of the bridegroom, takes a flashlight photograph of the bridal couple, has no action for defamation if such behaviour is stigmatised as 'cowardly' and 'ungentlemanly'. The case proceeds on the basis that the press is not privileged; that it has no 'high mission' to portray the private lives and incidents in the private lives of other people. Hilbery, J., in the course of his judgment, put it thus: 'I do not think it can be too strongly emphasised that in this country the press has no right to go upon private property or into private places and to intrude upon private people and into private rights, and that the standard of conduct and manners demanded of them is as high a standard as should be demanded of every citizen in a civilised community' (p. 229).

This tempts one to ask: 'What can a bridal couple do to protect themselves in such circumstances?' In his interesting introduction Mr. Montgomery Hyde states, at p. 12, that 'in so far as the individual members of the public are concerned there remains one indefatigable safeguard. The courts will continue to protect the rights of the individual to his or her domestic privacy, and where these rights are infringed by eager and unscrupulous news-getters and news-vendors, appropriate penalties will follow'. The truth is, however, that the protection given by the law for infringement of personal privacy is of but limited scope (see Winfield, *Law of Tort* (3rd ed., 1946), § 183). Thus, even a judge is powerless if, against his expressed wish, his photograph is taken as he leaves the Royal Courts of Justice; though it would be otherwise if this took place in his court (pp. 29–30). The bridegroom in the instant case took the law into his own hands: he struck Lea and destroyed the camera. The result was that on charges of assault and malicious damage to property he was convicted, fined, and ordered to £185 for expenses and to replace the camera. Now, though it is clear that the evidence given by Lea in the proceedings at Bow Street Police Court created an impression more favourable to him than the true facts warranted (see pp. 223–4), it is submitted that had those facts been before the magistrate his decision would nevertheless have been the same; for Cecil clearly went beyond the narrow limits of the doctrine of self-help. (Support for this submission will be found at p. 250, where the magistrate assumed against Lea that he had 'forced his way into a house where he was not welcome' and, in taking the photograph, had done something 'he ought

not to have done'.) Whether Cecil would have been justified as a matter of law in 'seizing the camera, opening it, and destroying the film or plate . . . with no obligation to be over-tender in so doing if he met resistance', as was suggested by the *Justice of the Peace and Local Government Review* in the allegedly libellous article, must remain a matter of opinion until such point comes up for judicial determination. Be that as it may, a person whose photograph is taken (and published) without his consent appears, as the law at present stands, to be without direct legal remedy. (It is of interest to note that the offending photograph was, in fact, ultimately published in the *Daily Mirror*—though not until after the police court proceedings.)

The book comprises a verbatim report of the libel action, together with an account of the proceedings at Bow Street Police Court. No doubt certain features of legal as well as popular interest were involved, but this is not, in these days of acute paper shortage, sufficient justification for a 250-page book. The non-lawyer who is sufficiently conscientious to read it through from cover to cover is not likely to wax enthusiastic about this book; he will, I trow, be most puzzled about a good deal of it. The busy practitioner will probably not bother with it, though he may find useful those parts of the arguments and judgment which deal with the question of attributing to a journal the malice of a contributor of an article published therein. The tyro practitioner (not to mention the Bar student) will, however, be well advised to buy this book, for he will obtain undoubted practical benefit from a close study of it. He will find, inter alia, pages of skilful cross-examination by experienced counsel; and he will see the steps by which a libel action proceeds.

In conclusion it should be pointed out that this publication is an attractive one and the price most reasonable.

J. D. HAYMAN.

THE COMPLETE LAW OF HOUSING. By H. A. HILL, M.A., and D. P. KERRIGAN, B.L. Fourth edition. [London : Butterworth & Co. (Publishers), Ltd., and Shaw & Sons, Ltd. 1947. xlvi and 828 and (index) 52 pp. 37s. 6d.]

THIS edition of *Hill's Law of Housing* carries the law up to December, 1946; the most recent provisions regarding compensation on compulsory purchase could not therefore be included, and the last dealt with are those of the Town and Country Planning Act, 1944, and the Acquisition of Land (Authorisation Procedure) Act, 1946. However, if editors waited on fixity of the law there would be no new editions. In this one the principal decisions since the last have all been incorporated, although on a small point it is perhaps unfortunate that the reference on p. 110 to *Job Edwards, Ltd.* v. *Birmingham Navigations*, [1924] 1 K.B. 341, should be left without any mention of *Sedleigh Denfield's Case*, [1940] A.C. 880.

The book remains chiefly a detailed commentary on the Housing Act, 1936, supplemented by later statutes. As such it is frequently necessary to trace through several references and fit together separate notes in order to get a full statement of the law on any topic, such as fitness for human habitation. This process has disadvantages which are increased where any one note appears on the face of it to be exhaustive but is not so in fact. It is possible that in future editions greater clarity and certainty might be obtained by a wider use of more general notes on topics of frequent occurrence. Such a change if practicable would certainly be of advantage to those whose contact with this subject is only occasional. At the same time consideration might be given to the inclusion of more matter relating to housing not springing from the Act of 1936.

These suggestions do not, however, affect the value of the book as it stands as a careful and compendious commentary on the mass of legislation with

which it deals. Not least of its virtues is the fullness of reference to, and reprinting of, ministerial circulars as well as statutory instruments; the ready accessibility of material on a subject such as this is worth a great deal.

J. D. B. Mitchell.

The Agriculture Act, 1947. By J. Muir Watt, m.a. *Current Law Guide*, No. 1. [London : Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1947. viii and 77 and (index) 3 pp. 6s. 6d.]

The scope of this book is limited as is indicated by the title of the series of which it is the first. It purports to be no more than a guide to the Agriculture Act, 1947, but it avoids being merely a paraphrase of it and gives a clear and accurate commentary with some reference to the interpretation of similar provisions in other recent legislation. These references, indeed, might have been expanded since the book is not intended solely for lawyers who would be familiar with them. Lawyers and laymen can both profit from it, since without dealing with all the nicer problems raised by the Act the author does bring out many of the difficulties of interpretation. This he does with charity to the draftmanship; the definition in section 10 of 'good estate management' might perhaps be criticised for more than vagueness.

There are no doubt strong reasons for the production of such guides soon after the statute concerned has been enacted, yet in cases such as this haste has its disadvantages. Until orders are made covering the organisation and function of such bodies as the Agricultural Land Commission and Tribunal and County Agricultural Executive Committees the Act remains a skeleton and a guide to it thus necessarily soon becomes incomplete, and some delay could be justified by compensating advantages.

J. D. B. Mitchell.

Year Book of the International Court of Justice, 1946–1947. [Leyden : Sijthoff. London : H.M. Stationery Office. 1947. 233 pp. 11s.]

Instead of the Annual Report that used to be published by the Permanent Court of International Justice, the new International Court of Justice is issuing a *Year Book* annually. This first volume provides a valuable survey of the background material that is relevant to an understanding of the manner in which the Court works.

Among the interesting features of the first *Year Book* are the short biographies of each of the Judges, a detailed bibliography of literature concerning international law, particularly international justice, published since the last report of the Permanent Court, and, perhaps most useful of all, a supplement comprising all the declarations—and reservations—made by States accepting compulsory jurisdiction under the Optional Clause of the Court's Statute.

For those who will not have time to read the Judgments, Advisory Opinions and other matter published by the Court, the *Year Books* will provide the means whereby they may keep themselves informed of the activities and importance of the International Court of Justice.

London. L. C. Green.

Le droit polonais au service de la paix dans la lutte contre les criminels de guerre. By M. Muszkat and others. [Published by Le Service Polonais pour la recherche des criminels de guerre. Poland. 1947. 58 pp.]

In May, 1948, the Lord Chancellor expressed his sympathy with those who argued that it is time the trials in Europe for offences, particularly political and war crimes, committed before or during the war were terminated. It is very likely that many kindred spirits will be found among the readers of this pamphlet, which consists of the reprints of three addresses submitted by Polish lawyers to the International Congress of Democratic Jurists and the International Association of Penal Law.

It appears that, from the standpoint of Polish law, the greatest war crime is not war itself, nor the various crimes that were embodied in the Nuremberg indictment, but Fascism. Thus we learn that the punishment of war crimes should not be regarded as anything other than part of the struggle against Fascism, the ideology of which produces war. In view of this bias it is not surprising to find that whenever the legal basis of an argument is a little difficult to maintain or justify, appeal is made to extra-legal concepts. Thus we find it being argued that all comments concerning *nullum crimen* and *ex post* law are irrelevancies, only put forward by those who did not suffer personally and directly in the recent war. Instead, the learned jurists argue, in the first place, that Parliament can do no wrong and so the maxims are purely academic, and secondly, the extraordinary and original character of the 'Hitlerite' crimes was such as to require extraordinary and original treatment.

In this pamphlet we find it asserted that the Nuremberg Charter is the expression of post-war juridical humanitarian tendencies; hence, dissatisfaction is expressed at the fact that the judgment contained no assertion that crimes against humanity as such, regardless of their connection to acts of war, constitute crimes punishable by international law. Nowhere, however, is there any reference to the fact that in the Nuremberg Charter as originally drafted this crime was provided for. In the English and French texts of August 8, 1945, a semi-colon appeared between 'war' and 'or' in Article 6, paragraph (*c*), while a comma appeared in the Russian text; by an amending protocol of October 6, the comma was introduced into the English and French text. The effect of this amendment was to narrow the scope of the crime against humanity and render it impossible for the tribunal to return any verdict on this count, other than that to be found in the judgment.

Unconsciously, perhaps, the 'Socialist' concept of law has crept into this discussion on Polish law and the punishment of war criminals. At p. 20 we learn that the modern State is a coercive organ directed to certain ends in accordance with its social structure and the ideology of its working class, and so, in a revolutionary State, *lése-majesté* becomes *counter-revolution.* Surprisingly enough, however, it is asserted that there is a higher natural law comprising the fundamental rules of morality and such general principles of law that none—not even the State—can infringe them with impunity (pp. 38–9). On this basis it is argued that if the law forbids certain acts in time of war, those acts must also be criminal if committed in time of peace. Among the postulates of this higher law are the following: no punishment for being a member of a particular nation; no extermination merely for being a member of a particular race; complete religious freedom; no legal responsibility for political opinion; and the criminal nature of aggressive war (pp. 39–40). In view of the fact that tribunals should reflect the new democratic tendencies in justice (p. 30), it is not surprising to find that persons guilty of breaches of these natural laws may be judged and punished without recourse to law, not in accordance with the Nazi concept of 'the healthy instinct of the people', or, as it is put here, *le bon sens national*, but in accordance with *le bon sens humain.* Since the end of the war the word democracy has lost any objective

meaning and now varies according to the political or national outlook of the person using it. It is a little difficult, therefore, to appreciate just how the writer's *bon sens humain* differs from the *bon sens national* which he condemns so vehemently (p. 40).

The third paper in this pamphlet is devoted to putting the Polish case concerning the acquisition of eastern Germany. Needless to say the argument is based on Potsdam, which, we are told, established definitive frontiers merely requiring formal recognition in the peace treaty. In support of this argument it is pointed out that the Great Powers at Potsdam allowed expulsion of Germans from these territories and the settlement of Poles in their place, and the writer inquires how this *fait accompli,* which the Powers 'recognised' at Potsdam, is to be upset.

The pamphlet is interesting, and the Polish publishers are to be congratulated on extending its availability by printing a French text, for nothing is to be lost and much may be gained by English lawyers attempting to understand the new legal—or, perhaps it is more correct to say, extra-legal—concepts of eastern Europe. The value of the pamphlet, however, would have been much enhanced if the political bias and not the law had been pushed into the background.

London. L. C. Green.

Documents of International Organisations: A Selected Bibliography. [Boston: World Peace Foundation. Published quarterly. $2.50 per annum; $0.75 per copy.]

International Economic Organisations: The Transition from War to Peace. [London: His Majesty's Stationery Office. 1947. 40 pp. 1s.]

International organisations became common after the first world war, but never in the period between the wars did so many exist as now, and the quantity of documents and paper that has been issued by them since 1945 already far exceeds the total output of the League of Nations and the other international organisations throughout the periods of their respective existence. Today, including organisations like the Council of Foreign Ministers and the Allied Control Councils, some forty or more such international institutions are at work, each contributing its share of paper, and each possessing its own abbreviated title to confuse the technician as well as the man in the street.

Anything that is likely to ease the problem of studying these organisations and their work is, therefore, to be welcomed, and both pamphlets now under review contribute to this end.

The Stationery Office has provided a brief survey of some twenty *International Economic Organisations* which have contributed to the transition from war to peace. Students and others interested will here find a résumé and an indication of the organisation and activities of each of these institutions, and should be able to estimate without difficulty the role which each has played in this transition. The value of the pamphlet is greatly enhanced by the inclusion of a table listing twenty-one international economic organisations and the States members of each in June, 1947, and it is to be hoped that the Stationery Office will print periodic amendments bringing this table up to date, for it would be interesting to know whether any other State has joined France, the United States and the United Kingdom as the only States members of all the organisations listed.

As a supplement to *International Economic Organisations,* the bibliography issued by the World Peace Foundation serves a very useful purpose. Anyone wishing to do serious research on these economic organisations or on the other International Organisations that now exist, must have recourse to official

documents. This *Selected Bibliography* provides a comprehensive index of the official documents issued by all the international organisations that now exist or that functioned for a short while after the end of the war and have now been absorbed by other institutions. The bibliography does not merely detail the names and reference numbers of all these documents, but also gives a brief note as to the contents of each, so that the reader is able to separate the chaff from the wheat without having to undertake the irksome task of consulting all the documents quoted on the subject in which he is particularly interested.

When it is realised that this first issue of the first volume contains eighty-three pages of entries, it becomes obvious that no single person and no single book could deal adequately with the post-war international organisations.

London. L. C. Green.

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CZECHOSLOVAKIA BETWEEN EAST AND WEST

By William Diamond

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